A

REFUTATION,

BY HIS FRIENDS,

OF

THE CALUMNIES AGAINST

DAVID HENSHAW,

IN

RELATION TO THE FAILURE OF THE COMMONWEALTH BANK,

AND THE

TRANSFER OF SOUTH BOSTON LANDS TO THE UNITED STATES.

BOSTON:
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REFUTATION.

The recent rejection, by the Senate of the United States, of the nomination of David Henshaw, as Secretary of the Navy, has been followed by reiterated newspaper assertions, that among the reasons for this action of the Senate was "his participation in the alleged fraud in the Commonwealth Bank transaction, by which the government was cheated out of a large sum of money, in taking South Boston lands in payment of a debt."

In the exercise of an independent discretion, in confirming or rejecting any nomination submitted to them, the Senate of the United States may rightfully stand above all question in every matter affecting the political relations and personal qualifications of the party, aside from individual character and integrity. But if they assume to reject a nominee upon these last grounds, they virtually assume as high a responsibility as if acting under their judicial power of impeachment, and their decision, in such case, should be warranted, not by charges or suspicion merely, but by substantial proofs. And in the exercise of this high duty imposed by the constitution, the judgment and conviction of each Senator, and not the direction of an organization separate from the official action required of him, ought, it is conceived, to determine that action, when applied to the rejection of any nominee, upon grounds affecting his personal integrity or moral character. The fact that in this case, the Senate instituted no investigation, preferred no charges, and heard no evidence, is sufficient proof that the alleged reasons of rejection are not the true ones; though the bold and reiterated assertions of newspapers hostile to Mr. Henshaw, and which have been suffered to pass without reply, may not have been without their influence, in producing false impressions.

Knowing that the senators, who voted against Mr. Henshaw, did not enter officially into any investigation of the calumnies affecting his personal integrity, and that therefore they must be ignorant of the conclusive answer which facts and documents can give to every one of them in detail, and to all in the aggregate; we have too much respect for them as honorable and high-minded men, to believe that they passed upon the character of any man, without giving him a hearing; and therefore we do not believe that Mr. Henshaw was rejected upon any other than political and party considerations.

With these we have no concern, and have nothing to say in censure on the one hand or extenuation on the other.

We take issue only with the assumed fact that the reason, or any part of the reason for the rejection of Mr. Henshaw was rightfully founded, if at all, upon alleged fraudulent, dishonest or dishonorable transactions on his part, in his former relations to the United States as a public officer, or in his private acts as a man.

In this respect, the action of the Senate is taken and attempted to be pressed upon the public, as a solemn verdict against Mr. Henshaw; and though similar accusations were met and put down, personally and through an investigation of the Department, five years ago, yet in this new aspect of an assumed expression of the Senate, it is deemed proper by the friends of Mr. Henshaw to collect the abundant evidence

of his justification, in form, and to distinctly meet the issue as it stands; not for him alone, but also for the many men, of heretofore unimpeached integrity, who, if he were guilty of the alleged frauds, were principals or accessories with him, in every act, and who, if he is to be condemned by the supposed *ex parte* judgment of the Senate, must be equally condemned with him.

Upon what that judgment was founded, has not yet transpired. The executive sessions of the Senate are held with closed doors, and the injunction of secrecy can be removed only by that body. They have done so, as to the yeas and nays upon the nomination, but not as to the debates and the alleged grounds of the rejection. On the 14th of February, Mr. Henshaw presented to the Senate, through its President, Mr. Mangum, the following Memorial, which will sufficiently evince his desire and readiness to openly meet any charges that may have been privately preferred against him.

MEMORIAL OF DAVID HENSHAW.

"*To the Honorable the Senate of the United States:*

"The undersigned most respectfully requests the Senate of the United States to "remove the injunction of secrecy from their proceedings relative to his nomination "to the office of Secretary of the Navy, recently acted on by your honorable body.

"Reports have been circulated, he presumes not on the authority of any senator, "and widely spread through the public press, that charges derogatory of the personal "integrity and moral character of the undersigned were presented to the Senate or "to senators, and that some if not all those charges are now on file in the archives "of the Senate. The undersigned desires to meet those charges, if any such there are, "and challenges their exhibition. It is not to be presumed that any honest man, what-"ever his station, would prefer charges against any individual, the responsibility of "which he would hesitate to assume in the broad face of day. The undersigned can-"not persuade himself that your honorable body will permit the character of an Amer-"ican citizen to be thus assailed in the dark, or charges thus made against him to be "shown only in a distorted or perverted form; he therefore trusts that this, his appeal "to the high sense of honor which he hopes pervades the Senate, to be furnished with "copies of all charges, if any, against his character, and with the names of those who "made them, will not be in vain. And he is ready now, and will be ready at all "times, to repel and refute any and every such charge by whomsoever made.

"DAVID HENSHAW."

"*February* 14, 1844."

No action is as yet known to have taken place upon this Memorial; and in the mean time the false construction put upon the decision of that body, is attempted to be fastened upon the public mind as the true one. We will only add on this point, that the pretence of evasion of inquiry on the part of Mr. Henshaw, is thus put at rest; and further, that if the majority of the Senate rejected Mr. Henshaw upon any charges affecting his moral character, they are bound, as honorable men, to tell him what they were; or if they rejected him on other grounds, and with no reference to any such charges, they are equally bound, as honorable men, to say so.

While the nomination of Mr. Henshaw was pending before the Senate, neither he nor his friends deemed it fitting to enter into a newspaper controversy in his personal vindication. The press has consequently taken its full license in assailing him, and finding its first falsehoods uncontradicted, has grown more and more reckless in the invention of new ones, until the silence of conscious rectitude on his part, has been construed into acquiescence in a sentence of condemnation. His official relation to the government having now ceased, and a distinct call having been made upon the Senate for a full disclosure of all matters concerning him, that may have transpired before that body, his friends feel that they are fully at liberty to examine the allegations and calumnies, as far as known or insinuated, which either officially or unofficially, openly or secretly, have been preferred against him. And this refutation is, as its title imports, not the production of Mr. Henshaw, who has not written a line of it, but of his friends, with his sanction and approval of the facts it contains.

The charges all fall under two general classifications; first, as to the failure of the Commonwealth Bank, in 1838, and, second, the transfer of lands in South Boston to the United States, in part payment of a debt from the Bank to the United States. In this inquiry the concerns or conduct of the Commonwealth Bank have no bearing, except in their alleged connexion with Mr. Henshaw. He was at no time during its existence, either president, director, or officer of the Bank. The first directors chosen in 1824, when the Bank went into operation, were Messrs. John K. Simpson, Hall J. How, William Freeman, and John Henshaw in 1825. Messrs. William Parmenter and Adams Bailey were chosen directors in 1826; Samuel S. Lewis became a director in 1827; Charles Hood, in 1829; Oliver Fletcher, in 1830; F. S. Carruth, in 1832; and Messrs. Otis Rich and John Mills, in 1835. Mr. Parmenter retired from the direction in 1831; Mr. John Henshaw, in 1836; Mr. Bailey and Mr. Lewis, in 1837. Messrs. Carruth, Fletcher, Freeman, How, Mills, Park and Hood, were the directors when the Bank failed; Mr. Simpson, the president, who had held that office since 1832, having deceased a short time before the failure.

At the time of the failure of the Commonwealth Bank, David Henshaw was not indebted to the Bank, a dollar. He was endorser or surety to a large amount on negotiated paper, not then due, every dollar of which was fully paid; and in this connexion one prominent fact should be stated, viz., that the Bank or its creditors never lost a cent by Mr. Henshaw, nor by any relative, or connexion, or agent of his, in any form. The large debt of John Henshaw, amounting to some $80,000, and which occurred in the course of regular business transactions, was met, and paid, principal and interest, in specie funds, without diminution or depreciation.

There is, consequently, no pretext (aside from the relations of the Warren Association to the Bank) that David Henshaw, or any persons, under, through, or by him, were benefitted or relieved in any respect, by any arrangement preceding, at the time of, or subsequent to the failure of the Bank.

With this fact established, it must be assumed that if Mr. Henshaw was conusant of, or accessory to, any fraudulent transaction on the part of the Bank, it was without any possible pecuniary benefit or relief to himself, or those for whom he was in any manner responsible; which is, in substance, to charge a man, not deficient in sagacity, with fraud and crime without motive; a charge always so improbable, under any circumstances, as to demand strong and positive proof, before it can be entitled to credence.

So far from gaining by the failure of the Bank, Mr. Henshaw was a direct loser, to the amount of some $14,000, in shares he held in the Bank and its appendage the Commonwealth Insurance Company. Whatever previous knowledge, therefore, it may be assumed he had, that the Bank was about to fail, it is certain that he secured nothing to himself by it, but was a sufferer to the amount stated. And this fact of itself, in the absence of positive proof of previous knowledge, negatives the assumption. Thus much for his private and personal relation to the Commonwealth Bank.

In his official capacity as Collector of Customs, he had in the Bank, at the time of its failure, a general deposit placed to his credit, of - - - - - - - -	$65,941 77
Special deposit in specie, - - - - - - -	10,028 70
A balance of Treasury Notes, of - - - - - -	43,350 00
	$119,320 47

The special deposit in specie, was removed from the Bank about one o'clock, on the 11th of January, 1838, the day the Bank failed, and the balance of Treasury notes was withdrawn at two o'clock the same day. This appears from the statements of Thomas W. Colburn, Peter Dunbar, William A. Wellman, and Adams Bailey. [See Appendix No. 1.] The withdrawal of these two items of deposit could have no connexion with any anticipated failure of the Bank, because, as special deposits, they could not be appropriated by the Bank or its creditors, and could be withdrawn as well after as before the closing of its doors.

Aside from these specific items, the official relation of Mr. Henshaw to the Bank, left standing to his credit, as Collector, upon its books, at the time of the failure, on

the 11th of January, 1838, the sum of $65,941 77 belonging to the United States, and every dollar of this had been deposited by and under authority of the department, and, as will subsequently be seen, was repaid to the United States, upon a judgment against the Bank. In neither capacity therefore, as a private debtor to the Bank, whether as principal or surety, nor as Collector, did the Bank or the United States (aside from the Warren Association, which will hereafter be considered,) lose a dollar by Mr. Henshaw, or his relations, or by any person for whom he was responsible.

The only charge in this connexion, is, that Mr. Henshaw knew that the Bank was about to fail the evening before it closed its doors, and that he availed himself of this knowledge to call in his specie checks given out as Collector, and paid them in bills of the Commonwealth Bank; but this allegation will be shown, on examination, to be wholly unfounded in fact.

The concerns of the Commonwealth Bank were investigated by a committee of the Legislature of Massachusetts, in January, 1838, immediately upon the failure of the Bank. It was a period of great and feverish excitement, and of active suspicion in the public mind, with a strong political bias to make the Commonwealth Bank the scape-goat; and an investigation and report, made under such circumstances, were greatly liable to error. But taking that report as it is, with the corrections of the testimony made by the witnesses themselves, and let it have its full weight as to the point we are now considering, viz., the alleged previous knowledge Mr. Henshaw had of the failure of the Bank, and what is the fair conclusion? It neither asserts or proves a particle affecting David Henshaw.

The report affirms (page 15 of Senate document No. 35, for 1838) that "it appears to the committee that the concerns of the Bank, for a considerable period, have been left very much to the management of its late President, John K. Simpson, its Cashier, Charles Hood, and Hall J. How, one of its directors; while loans have also been freely granted to some of the other directors."

The report further says, that "when the directors first knew that they must suspend their operations, is unknown to the committee; but probably the large majority of them were ignorant of their near approach to the cataract, nor were sensible of the strength of the current that was sweeping them along. A meeting of a few of the directors and their friends was held in the evening of the 10th of January, when, no plan for relief being suggested, it became necessary, at the termination of business on the 11th of January, to close the doors of the Bank."

It is here admitted by the committee, that even a large majority of the directors did not previously know or anticipate the failure of the Bank, and there is no intimation in the report that Mr. Henshaw had any better knowledge of the crisis before it happened. An attempt, aside from the report, has been made to distort the testimony before the committee, of Mr. Hall J. How, into an inference of knowledge on the part of Mr. Henshaw, the evening previous to the failure. In the minutes taken before the committee, Mr. How is represented as making the following statement of a meeting at the house of Mr. John Henshaw, on the evening of the 10th of January.

"*Hall J. How.* There was a meeting at Mr. John Henshaw's, on Wednesday "evening before the Commonwealth Bank failed. The Cashier was present, "John Henshaw, David Henshaw, Charles Henshaw, and myself. I was invited "there by John Henshaw. I was not told what the object was. The general con- "versation was about the state of the Bank. Mr. David Henshaw inquired if the "Bank had been hard pressed. Mr. Hood said he had been a good deal pressed, "and if the bills pressed home hard, it would plague him to meet them. They "talked of trying to get help from the other banks. Mr. Hood said it was diffi- "cult. I think he said to David Henshaw, that he had applied to Mr. Stone, the "president of the Suffolk Bank, for assistance. Hood said Stone had declined to "help him. It was mentioned by Hood, that if the bills pressed home hard, and he "could not get help, he could not meet them. David Henshaw said, 'you must stir "your stumps.' There was some talk about the government money; but I do not

" recollect what it was. *D. Henshaw seemed to express a good deal of surprise at* " *the Cashier's statement.* I do not recollect that the Warren Association was " named. It was agreed, unless we could get help, it would be impossible for us to " meet the bills or balances. *It was finally understood that we must stop.*"

The latter part of this statement, as taken before the committee, on the 6th of February, 1838, was disclaimed by the witness, Mr. How, in a note of February 16, 1838, as soon as his attention was called to it. He there says, that the report of his testimony is inaccurate in some particulars,—that he had no recollection of reading the minutes taken by the committee, or hearing them read; and adds, " I think " I could not have stated that it was agreed and finally understood that the Bank " must stop. It was only understood that the Bank must stop *in case it was pressed* " *to pay its bills and balances, and could not obtain assistance.*"

This explanation, published in 1838, has never been contradicted. Mr. John Henshaw, one of the parties present at that meeting, also stated on the 16th of February, 1838, that " from the tenor of the conversation, I apprehended no immediate " danger to the Bank, and when the conversation ceased upon that subject, I sup- " posed the Bank would make an effort to raise the requisite means from its " resources."

Taking this evidence together, (and it is the whole on this point,) it appears, that so far from anticipating the embarrassment of the Bank, David Henshaw expressed a good deal of surprise at the Cashier's statement; that he urged active exertion to meet the difficulties, and that there was no understanding then that the Bank was to stop, except in the alternative that it was pressed to pay its bills and balances, and could not obtain assistance; and at that time of general suspension and want of confidence, the same might have been said of almost every bank in the Commonwealth.

A further attempt was made to bring home to Mr. Henshaw a previous knowledge of the failure of the Bank, through the alleged testimony of Mr. Albert Fitz, the discount clerk. At the time of the investigation, before the committee of the Legislature, the Boston Atlas, in its pretended report of the testimony, made Mr. Fitz say, that " the specie deposit of the Collector, $60,028 70, was drawn out by him the middle of the forenoon on the 11th of January." No such testimony of Mr. Fitz appeared in the evidence reported by the committee of the Legislature, and in a note, published the 16th of February, 1838, Mr. Fitz himself declares, " *I gave no such testimony.*" The printed minutes of the evidence, appended to the report of the committee, made Mr. T. W. Colburn say, that " the specie deposit of the Collector, $10,028 70, was drawn out by him *about* the middle of the forenoon of 11th of January;" but Mr. Colburn, in a note of February 16, 1838, then published, affirmed that, so far as he could recollect, it was *between the hours of twelve and one*, and that his testimony was taken verbally by the committee, and was not read over to him. And in point of fact, from the most conclusive testimony, the actual time of the withdrawal of the specie deposit is proved to have been between one and two o'clock, of the 11th of January, and the balance of Treasury notes was drawn out at two o'clock the same day. [See Appendix No. 1.]

The only other, and the main fact relied on, to prove the assertion that Mr. Henshaw knew of the anticipated failure of the Bank, is the publication of the following notice in the Morning Post of Thursday morning, the 11th of January, 1838, the day of the failure:

" *Notice.*—Persons holding checks against the Custom House, are requested to present them either at the Bank or at this office, for payment, immediately.

DAVID HENSHAW, *Collector.*"

The inference attempted to be drawn from this notice is, that Mr. Henshaw, knowing the Bank was about to fail, called in these checks for the purpose of having them paid off in the bills of the Commonwealth Bank; and upon this slight pretext is founded the newspaper allegation of " cheating the poor fishermen, by palming off upon them the bills of a broken bank."

But the whole allegation fails, from the single fact that these " specie checks "

never went to the fishermen, and no fisherman ever had one of them.* They were issued for debentures, (that is, for refunded duties or drawbacks on the exportation of imported goods,) were due and payable in specie, and though nominally payable at the Commonwealth Bank, they were well known to be payable at the Custom House in specie, whenever demanded. In point of fact, not one of these checks was ever presented at the Bank, in consequence of the above published notice, but they all came to the Collector's office, and were there settled in specie. Mr. Henshaw was just retiring from the office, and the return of the specie checks was necessary, to enable him to close his accounts, and hand the business over to his successor.

Upon the face of this allegation appears the utter inadequacy of motive for such a proceeding. Mr. Henshaw, as Collector, could derive no possible benefit from paying the Collector's checks in the bills of the Bank. The deposits to his credit in the Bank, as Collector, as will be proved hereafter, were not made by him, but passed to his credit *after* the suspension of specie payments, by direction of the Secretary of the Treasury. If his checks, which it was optional with the creditors of the United States to take or not, were paid by the Bank in its bills, the amount so paid would be charged against his deposit, and could avail him nothing. It must therefore have been a gratuitous and uncalled for proceeding on his part, to "cheat the poor fishermen," or the holders of his checks, for the sole and exclusive benefit of the United States, and that too, to merely the extent of the discount upon the inconsiderable amount which it was likely this notice would call in during the banking hours of the 11th of January, on which day, and on the evening before, it is assumed, in order to carry out this charge, that he knew the Bank would fail! As Mr. Henshaw himself said, in his notice of this assertion, in 1838,—"the improbability that any man of common sense "would attempt to cheat the poor fishermen for the sole and exclusive benefit of the "United States' Treasury, is so strong, that this charge could gain little belief from "an intelligent community."

The allegation, however, is disproved, not merely by its inherent improbability, but by positive evidence. It was first made in the Boston Atlas, of January, 1838, and was then met by the following published statement and evidence:

David Henshaw's statement, in 1838.

"The first that I knew of the embarrassment of the Bank, was on Wednesday "night, January 10th, and I was surprised at the information. I had been for some "weeks prior to the 8th, confined to my bed by sickness. From the 8th to the time "of its failure, I had Treasury notes enough in the Bank to meet all my checks "drawn upon it. *The first I knew that the Bank would stop, was near one o'clock, "P. M., on Thursday, the 11th.* The advertisement, calling in my outstanding "checks, which appeared on the 11th of January, and about which so many "unfounded charges and unjust imputations have been made, was written, on the "suggestion of William A. Wellman, Esq., as will appear by his letter herewith "given, before I knew that the Bank was embarrassed, and with no reference whatever to that subject. DAVID HENSHAW."

Mr. Wellman's testimony, in 1838.

"*Custom House, Boston, Feb.* 16, 1838.

"Your note of this date, asking me to state 'under what circumstances, on whose 'suggestions, and at what time the advertisement calling in the outstanding checks "against the Custom House, was written and sent to the printer,' is before me. In "reply, I have to state, that on the 9th of January last, I was requested by you to "take charge temporarily of the cash affairs of this office; that on the *morning* of

* Mr. William A. Wellman, the temporary Cashier, and now an officer of the Customs, thus described these checks, in a statement made by him Feb. 16, 1838:—

"Specie checks, so called, were checks drawn by the Collector on the bank, but received, at the option of the holders, in payment of government dues at the Custom House, instead of specie. From the suspension of specie payments, in May, 1837, up to January 20th, 1838, there were issued and redeemed nearly eleven hundred thousand dollars in amount of those checks, to the very great convenience of the mercantile public."

" the 10th of January, *I suggested to you* the necessity of ceasing to issue *specie checks*, " and of calling in those outstanding, to enable me to close the accounts of the office; " and that on the instant of the suggestion, you did, in my presence, write the adver- " tisement referred to, and called for the messenger to take it to the printer."

" WILLIAM A. WELLMAN,
" *Late temporary Cashier of the Boston Custom House.*"

" Hon. David Henshaw,
Late Collector."

Notwithstanding this express testimony of Mr. Wellman, (who was of opposite opinions to Mr. Henshaw in politics, and has since held the office of Deputy Collector under Hon. Levi Lincoln,) the publication of that notice has continued to be cited by the newspaper calumniators of Mr. Henshaw, as proof of his intent " to cheat the fishermen," and palm off the bills of a bank he knew was about to fail. This single fact serves to show with what pertinacity refuted falsehood and unfounded surmises are adhered to and persisted in, to give color to charges against Mr. Henshaw.

Mr. Wellman's testimony in 1838, proved, that the notice was written and sent to the paper, at his, Mr. Wellman's, suggestion, on the *morning* of the 10th of January. This was the morning of the day upon the evening of which day the meeting was held at Mr. John Henshaw's house, at which *last* time any knowledge of the embarrassment of the Bank was first brought home to David Henshaw. This is sufficient to show that the issuing of that notice could have had no possible connexion with the failure of the Bank. But there were other reasons for its publication, which Mr. Henshaw withheld, and desired Mr. Wellman to withhold at the time, that will place this matter in a light honorable to him in the estimation of every fair-minded man.

On the 8th and 9th of January, 1838, a deficiency of between four and five thousand dollars was discovered in the accounts of the then Cashier of the Custom House. The extent of the defalcation was not known. Mr. Henshaw immediately requested Mr. Wellman to take charge of the cash concerns of the office, and ascertain the extent of the deficit. In the business of the office, " specie checks," as above explained, had been drawn by the Cashier and signed by the Collector, on the Bank, from the period of the suspension of specie payments, in May, 1837; and these checks, which commanded a premium over current bank notes, about equal to the premium on specie, were received at the option of the holders, in payment of government dues at the Custom House, instead of specie, or in specie if required. To close the cash accounts of the office, and ascertain the amount of these checks which the Cashier might have drawn and got signed, almost *ad libitum*, it was necessary, in the opinion of Mr. Wellman, to whom that duty was intrusted, to cease issuing specie checks, and to call in those outstanding. This led to his suggestion to the Collector, to that effect, on the morning of the 10th of January, which was followed by the notice in question, the propriety and necessity of which are self-apparent. The defalcation of the Cashier was subsequently restored by his friends, and from motives of respect for them and kind feeling toward the erring party, Mr. Henshaw has never publicly alluded to the circumstance, and has submitted to the unjust imputation cast upon him, which the publication of that fact would at once have removed. The additional statement of Mr. Wellman will show how unjustly Mr. Henshaw has been accused in this particular. [See Appendix, No. 2.]

In his recent letter to the Hon. Mr. Saunders, Mr. Henshaw has said, that " the first fisherman is yet to be found, who ever received a dollar of the Commonwealth Bank money as stated." And this might well be affirmed from the fact that no fisherman has ever presented or intimated to Mr. Henshaw that he had on hand a dollar of the bills of that Bank, received in the manner alleged. Had any fisherman so suffered by depreciated bills, it is almost certain he would have made it known to Mr. Henshaw.

The Boston Atlas of February 3, attempted to disprove the above by an anonymous publication, giving an amount of bills alleged to have been in the hands of fishermen and shoresmen after the failure of the Bank, on which bills it is averred they lost a

discount of just $300. The assertion of Mr. Henshaw, in his letter to Mr. Saunders, was made on the fact that no fisherman had ever complained to him or applied for redress, and also on the authority of a gentleman of Marblehead, who stated that the president of an insurance company, in that town, had inquired of all the masters of fishing vessels who had received bounties at that time, and he could not find a dollar in the hands of any of them. This is probably correct, and the statement in the Atlas to the contrary, notwithstanding its details, is not to be relied on. The fact that it includes the pension money in this list, leaving it to be inferred that Mr. Henshaw had something to do with those payments, is suspicious, and is marked by the usual unfairness of that mendacious press. And, moreover, it implies that the fishermen received this money of the Bank on the *twelfth* of January, when in fact the Bank failed on the *eleventh!* So that if any fishermen had Commonwealth Bank bills which were received on the 12th of January, they could not have got them from Mr. Henshaw, nor from the Bank, for no checks of his were paid by the Bank after the 11th. But taking this anonymous statement as it is, it amounts to the absurd charge that David Henshaw volunteered to defraud the fishermen of $300 for the sole and exclusive benefit of the treasury of the United States, out of an issue of $200,000 in fishing bounties paid in that year!

We have now examined all the facts which go to show any previous knowledge of or connexion with the failure of the Commonwealth Bank, on the part of Mr. Henshaw. There is not a particle of evidence that attaches any knowledge to him, previous to the meeting on the evening of the 10th of January, and that is proved to have been, not a knowledge that the Bank would fail the next day, but that it was in an embarrassed condition and hard-pressed, as were most of the banks at that period. The positive denial of Mr. Henshaw, and all the concurring testimony as to the interview, and what preceded and followed it, go to prove the negative, and to show that Mr. Henshaw had no knowledge that the Bank would fail, until about one o'clock on the day of its failure.

There is no act which Mr. Henshaw did previous to the closing of the doors of the Bank, that he would not have done, had be been entirely ignorant of the condition of the Bank until one o'clock on the day of the failure. These acts, and the only acts, are, *first*, the publication of the notice to call in the specie checks. This is fully explained by Mr. Wellman, and that notice would have been made under the circumstances, had the Bank never failed.

Second. The withdrawal of the special specie deposit between one and two o'clock, and of the balance of Treasury notes at two o'clock, on the day of the failure; and both these acts are consistent with, and were consequent upon, the knowledge, at about one o'clock that day, that the Bank would fail.

All of these acts were for the benefit of the United States, and not for the benefit or security of Mr. Henshaw. The blind inconsistency of the calumniators of Mr. Henshaw exhibits itself in their charging him, at one moment, with dishonestly withdrawing funds from the Bank, in consequence of his *previous* knowledge that it would fail; and in the next, for want of fidelity to the government in *not* withdrawing these funds! His principal accuser, the Boston Atlas, charged him, in 1838, with fraudulent conduct in calling in his specie checks to save the government the discount on the bills at the expense of the poor fishermen; and now that same paper, under date of February 3, 1844, reverses that charge in the following form: "He (Mr. Henshaw) unquestionably knew the state of the Bank long before it failed, and "he *neglected* to take the proper means to secure the moneys belonging to the "government. His statement that the moneys were deposited there by authority of "the government, amounts to nothing. By whatever authority the deposit was "made, it was his duty, if he saw the impending danger, to have looked out for the "safety of the government funds."

So that, according to the logic of his accusers, if Mr. Henshaw *did* remove the funds of the United States, he was guilty of fraudulent conduct in so doing; and if he did *not* remove them, he was guilty of official misconduct in not looking out for the safety of those funds! And again, by the same process of reasoning, the Atlas first charges Mr. Henshaw with conniving at fraud to save his responsibility for deposits made in

the Bank without authority, and then says it amounts to nothing whether the Collector made the deposits with or without the authority of the government!

The answer to all this, is, that Mr. Henshaw did not look out for himself when the Bank failed, but he did look out for the United States. He lost the value of all his shares in the Bank, and did not provide for himself, as he might have done, by their sale or transfer, had he anticipated the failure of the Bank. He took no measures to secure or relieve himself upon his large endorsements, which he also might have done, had he availed himself of a previous knowledge of the failure. He was not personally responsible for the checks he had issued, nor for the deposits made by the government, these being exclusively official acts; and yet the only acts he did, after it is pretended he knew the Bank would fail, were directed solely to preserving the funds of the United States.

This brings us up to the failure of the Bank, and disconnects David Henshaw from it, in any relation that he could or did derive benefit from, by anticipating its failure; and thus the entire allegation, and its consequent calumnies, founded upon his assumed previous knowledge of the failure, or of any act of his connected with that failure, which was disreputable or improper in the highest mercantile or moral sense, utterly fails.

We will now examine *the relation of Mr. Henshaw to the Bank, after its failure*, and to the securities which the United States held against the Bank.

On the 13th of January, 1838, the debt due the United States, as subsequently ascertained, was $338,797,94.

The items that made up this sum were as follows:

Deposit to the credit of the Collector, - - - - -	$65,941 77
Deposit of Messrs. Shaw, How and Lewis, as Commissioners for building the Custom House, - - - - -	71,555 38
John K. Simpson, as Pension Agent, - - - - -	152,684 21
Credit to the Treasurer of the United States, balance stated at $51,749 90, but found to be - - - - -	39,636 93
Deposit to the Post Office Department, - - - - -	7,806 99
Deposit, Army Paymaster and Ordnance, - - - -	1,172 66
	$338,797 94

David Henshaw held no relation, whatever, as principal, or surety or depositor, to either of these items, except the deposit to the credit of the Collector, of $65,941 77.

It has been affirmed and reiterated that the United States had a legal claim against him for this sum; but such was not the fact. For the purpose of simplifying the inquiry, we will here trace this item through to its final settlement, because more stress has been laid upon it by Mr. Henshaw's accusers, than any other, to charge him with indebtedness to the United States; and if he was not held for this, he was in no way held to the government for a dollar.

To prove that the Collector was liable for this sum, a portion of the report of the Solicitor of the Treasury (Mr. Gilpin) to the Secretary of the Treasury, (Mr. Woodbury,) dated, January 25, 1839, and a letter of the Solicitor to the District Attorney, (Mr. Mills,) of February 9, 1838, are relied on; and it has been asserted, over and over again, but never proved, that the government had a good claim on David Henshaw for this deposit. This was disproved, and the conduct of Messrs. Henshaw and Mills, in all these transactions, fully *approved* by this report of the Solicitor and Secretary, which is now quoted in part, to accuse Mr. Henshaw.

The report of the Solicitor of the Treasury above alluded to, is found in document No. 120, of the House of Representatives, of the 25th Congress, January 26, 1839, which will be hereafter referred to for another purpose. [See Appendix I.]

The Solicitor there says:

"On the 24th of January, (1838,) the Secretary of the Treasury informed this "office that, in addition to the balance reported on the 18th, as due (from the Bank,) "there were considerable sums of public money placed there by collecting and "disbursing officers, and still remaining on deposit in the Bank, which were included "among its liabilities to the United States, and for which the sureties in the official

"bond were *considered by the Treasury Department to be liable, as well as the officers,* "*personally, who made the deposits.* Instructions were immediately given to the "District Attorney to this effect."

Mr. Woodbury's letter of the 24th, above referred to, does not express the opinion that the officers who had made the deposits were personally liable; and if it had done so, it would have attached that liability, not to Mr. Henshaw, but to the Secretary of the Treasury; because, as will be seen hereafter, Mr. Henshaw never deposited a dollar, except special deposits, in the Commonwealth Bank after its suspension in May, 1837.

The letter from the Treasury Department, upon which the Solicitor wrote his instructions to the District Attorney, Mr. Mills, is as follows:

"*Treasury Department, January* 24, 1838.

"SIR: Besides the balance standing against the Commonwealth Bank, upon the "books of the Treasury, it is understood that considerable sums of public money, "which were placed there by collecting and disbursing officers, still remain on "deposit with that Bank. As these balances *are included in the liabilities of the* "*Bank to the United States, and are covered by the bond executed in its behalf,* I "have to request that the District Attorney may be instructed to keep them in view "in any course he may adopt, for the protection of the interests of the United States. "Their amount can be ascertained at Boston.

"LEVI WOODBURY,
Secretary of the Treasury."

"To H. D. GILPIN, ESQ.,
Solicitor of the Treasury."

The above letter, enclosed in the one from the Solicitor to the District Attorney, was received by that officer on the 30th of January, 1838, and formed the basis of his instructions, as will be seen by the District Attorney's report to the Solicitor, of August 6, 1838. [See Appendix D.]

In pursuance of these instructions, the District Attorney, on the same day they were received, commenced suits against the several sureties of the Bank, on the deposit bond of February 14, 1837, laying the damages at $400,000, and including the balance to the credit of the Collector, of $65,000. David Henshaw was not on the deposit bond, and no action was commenced, nor directed to be commenced against him, nor against either of the other disbursing or collecting officers.

The other letter relied on to establish the alleged liability of David Henshaw, is the following, to the District Attorney:

"*Office of the Solicitor of the Treasury, Feb.* 9, 1838.

"SIR: I now enclose you certified copies of all the bonds which you may have "occasion to use in your proceedings against the Commonwealth Bank of Boston. "and also of the contract of that institution with the Secretary of the Treasury, "dated 15th of July, 1836. It is considered by that officer that the bond of the "Bank given on the 14th of February, 1837, *embraces all moneys and funds what-* "*soever, belonging to the United States, or deposited therein on its behalf, by any of* "*its officers*, with which it was chargeable at the time of its failure. All these, there- "fore, *you will include in your legal proceedings*, and omit no measure necessary to "give notice and enforce the priority of the United States against the Bank, or any "deceased or insolvent persons into whose hands their property may have come.

"Very respectfully,

"H. D. GILPIN,
Solicitor of the Treasury."

"To JOHN MILLS, ESQ.
U. S. District Attorney, Boston."

By these instructions, and the legal proceedings consequent thereon, the United

States ratified and assumed as its own, the acts of all its agents in relation to the deposits standing to their credit in the Commonwealth Bank.

The legal construction is perfectly clear on this point. These several deposits were either lawful or unauthorized as to the agents. If lawful, or if directed by the Department, the Bank, and not the agents were liable. If unauthorized and unlawful, the United States must look to its agents and their sureties, and not to the Bank. If David Henshaw had been liable for unlawfully depositing the sixty-five thousand dollars, the United States had its remedy against him and his sureties, but it could not sue the Bank for that sum, under a bond covering only lawful deposits, thus ratifying and confirming the deposit as lawful, and then claim the same sum of Mr. Henshaw, on the ground of a violation of official duty, in making the deposit!

The United States made its election by suing the Bank for all the deposits, and here the individual liability of David Henshaw, as late Collector, and of Messrs. Robert G. Shaw, Hall J. How, and S. S. Lewis, as Commissioners in the Custom House, and of the other disbursing officers who had balances in the Bank to their account, was at an end, if indeed any such liability ever existed.

And in point of fact and law no such individual liability ever existed.

In the case of the Custom House Commissioners, their deposit was made before the Bank suspended in May, 1837.

In the case of David Henshaw, he did not deposit the sixty-five thousand dollars or any part of it, after the suspension, but that sum and more was passed to his credit, without his agency, by the Treasury Department, *after the suspension.*

A misapprehension in some, and a wilful misrepresentation in others, on this point of the origin of the balance left when the Bank failed, has been the source of many groundless charges against the late Collector.

Mr. Henshaw tendered his resignation to President Jackson, in the early part of 1836, but remained in office, at the special request of the President, till the end of his term, the 4th of March, 1837. He again tendered his resignation to President Van Buren, at that time, but was requested by him to remain, which he did until the fall of 1837, when he again resigned, to take effect on the 1st of January, 1838; and had a successor been appointed at that time, Mr. Henshaw would not have been in office when the Bank failed. But his successor was not inducted till the 20th of January, 1838, and then this balance remained on the books of the Bank.

The origin and legality of all the deposits made in the Commonwealth Bank, and out of which this balance arose, will be seen from the following facts.

Previous to any act of Congress upon the subject, and when by the act of President Jackson, in the removal of the deposits, the State Banks were substituted for depositories of the public money in 1833, Mr. Henshaw, as Collector of the port of Boston, was directed to make deposits of the public money in the Commonwealth Bank, which he accordingly did, and his proceedings in this respect, were fully approved by Mr. Secretary Taney, the 5th of October, 1833.

The details of these proceedings were as follows. On the 26th of September, 1833, Mr. Secretary Taney notified Mr. Henshaw of the determination to remove the deposits, and that he had selected the Commonwealth Bank and Merchant's Bank in Boston, for depositories. Contracts to this effect were forwarded to the Collector for those Banks to execute, and instructions given to make deposits therein, after the 30th of September, of all the public moneys, until further orders of the Department. [See Appendix No. 3.]

Mr. Henshaw's reply to the Secretary, of September 30th, enclosing the contracts, suggested a mode of dividing the public business between the two Banks, which was acceptable to them, and would require the Collector to keep an account with but one Bank, thus saving half the labor. [See Appendix, No. 4.] This modification was adopted and fully approved by the Department, as will be seen by Mr. Taney's letter of October 5th, 1833, in which he says, "your proceedings are approved by the Department." [See Appendix No. 5.]

The deposits continued to be made under the above authority, until the passage of the deposit act of June 23d, 1836, by Congress. The 15th of July, 1836, the Bank executed a contract "to discharge all the duties and services prescribed by the

Act of the 23d of June, 1836," and on the 14th of February, 1837, a bond was executed with sureties, for the performance of the contract entered into by the Bank on the 15th of July, 1836. Under this arrangement between the Department and the Bank, which was wholly independent of Mr. Henshaw, the deposits continued to be made by authority of law, until the Bank, with all others in the State, suspended specie payments the 12th of May, 1837.

The Commonwealth Bank accordingly ceased to be a deposit bank, on its suspension of specie payments, in May, 1837, and was notified to that effect the 18th of that month. At that time, Mr. Henshaw had to his credit as Collector, in that Bank, the sum of $80,821 49, which had been deposited under the above instructions and authority, before the suspension, and he so advised the Department in his letter of May 23d, 1837, giving the items; [for which see Appendix No. 6.] The accruing salaries and expenses of his office were paid out of this balance of $80,000, which would have been wholly exhausted by that appropriation; so that every dollar he had placed in the Bank before the suspension, under the deposit act, would have been withdrawn, and no balance have remained to his credit when the Bank failed, but for the following circumstances.

After the suspension, to wit, on the 21st of July, 1837, the Secretary of the Treasury caused to be placed to the credit of Mr. Henshaw, in the Commonwealth Bank, the sum of $30,500, as so much of the balance which was due the U. States when the Bank suspended in May, 1837. The authority for this credit, and the reasons that required it are explained in the Secretary's letter to Mr. Henshaw, which is subjoined.

" *Treasury Department, July* 17, 1837.

" SIR,—As it will become necessary, from time to time, to authorize the Collectors of " such of the Districts in the vicinity of Boston, to draw upon you for money to " defray the current expenses of their Districts, as do not collect revenue enough for " that purpose; in order to place you in funds for this object, the Treasurer of the " United States has been instructed to require the Commonwealth Bank, in your " city, to place to your credit, as Collector of the Customs, a portion of the moneys " deposited by you in that institution to the credit of the Treasurer, previous to the " suspension of specie payments, and which have not been brought into the Treasury " by covering warrant. The sum of thirty thousand five hundred dollars, will, accord- " ingly, be directed to be placed to your credit, in the aforesaid Bank, and be subject " to your check or draft.

" Respectfully, &c.

" DAVID HENSHAW, Esq. " LEVI WOODBURY,
Collector, &c." *Sec'y of the Treasury.*"

The Bank was accordingly notified of this transfer of credit, of which the Deputy Collector was informed by the Cashier, as follows:

" COMMONWEALTH BANK,
Boston, July 21, 1837.

" A. BAILEY, Esq.

" SIR,—I have received instructions this day, to place to the account of David " Henshaw, Collector, thirty thousand five hundred dollars, from the Secretary of the " Treasury, by John Campbell, Esq., Treasurer of the United States, which amount " has been credited as directed.

" Respectfully,
" CHARLES HOOD, *Cashier.*"

In December, 1837, it became necessary to provide for the fishing bounties, and the Secretary of the Treasury sent to Mr. Henshaw, for that purpose, a Treasury check upon the Commonwealth Bank for the further sum of $42,000, which was thus transferred from the credit of the Treasurer of the United States to that of the Collector, to pay the fishing bounties.

This fact was stated in the testimony of Thomas W. Colburn, Teller of the Bank, before the committee of the Massachusetts Legislature, as appears in their printed report. Mr. Colburn there says, "the Collector, Dec. 21, 1837, deposited a draft for $42,000, drawn by the Treasurer (of the United States) on the Commonwealth Bank." [See Appendix, page 60.]

The necessity for this arrangement, on the part of the Department at Washington, to meet the fishing bounties not only in Massachusetts and Maine, but in Rhode Island and Connecticut, the Collectors of which were authorized to draw upon Mr. Henshaw, will be seen by instructions to the Collector of Boston. [See Appendix Nos. 7 and 8.]

It will be seen, therefore, that the sum of $72,500 was thus placed to the credit of the Collector, by the Treasury Department, after the Bank ceased to be a deposit bank. There was at no time any other deposit to the credit of Mr. Henshaw, made by him or the Department, (except special deposits which were withdrawn,) in the Commonwealth Bank, during the period of suspension; so that the sixty-five thousand dollars to his credit, which remained in the Bank at the time of its failure, was a less amount than was placed there after the suspension, by the Treasury Department.

The manner in which that balance arose, was distinctly stated to the Treasury Department, by Mr. Henshaw, at a subsequent time, in the following communication:

Extract of a letter from David Henshaw, to Hon. Levi Woodbury, Secretary of the Treasury, dated Feb. 16, 1838.

"Since my letter to you of May 23, 1837, stating the balance then in the Com-
"monwealth Bank, there have been only two sums placed to my credit there, viz.,
"$30,500; ordered to my credit, as will appear by your letter of July 17, 1837, and
"$42,000 sent me in December last to pay bounties on fishing vessels. The last
"sum ($42,000) was put to my credit, and has been applied to the purposes for
"which it was remitted. The difference between the sum reported to be in the
"Bank, in my letter of May 23, adding thereto the sum of $30,500, ordered to my
"credit in your letter of July 17, and the sum now on hand, has been paid out in
"various disbursements for the United States.

"I beg you to understand that I have no difference with Mr. Bancroft, (his successor,)
"on account of this balance (the $65,000.) It is an amount belonging to the United
"States, standing to my credit as Collector, in the Commonwealth Bank, *placed there*
"*in conformity to Treasury instructions*, and which I am ready to transfer to my
"successor, or to any other person legally authorized to receive and receipt for it."

We have thus conclusively established the fact, that *not a dollar of the balance of* $65,941 *to the credit of the Collector, in the Commonwealth Bank, when it failed, was placed there by David Henshaw, after the Bank suspended and ceased to be a deposit bank, under the deposit act of* 1836.

How then could the United States have any personal claim whatever upon the Collector, for that balance, or any part of it, either in law, equity or honor?

The Collector's deposits, previous to the suspension in May, 1837, were of course lawful, because they were authorized and required by force of law; and the subsequent deposits were, in fact, made by credits passed to him through the direct action of the Treasury Department. The disbursements subsequently made by the Collector, from this fund, up to the failure of the Bank, left the balance of the $65,000 in question, and for this David Henshaw was in no way personally liable.

This statement was never called in question by the Secretary or Solicitor of the Treasury. In the final settlement of his accounts, as Collector, after he had resigned, Mr. Henshaw claimed to be credited, of course, with this sum of $65,941, and a further sum on emolument account for the year 1829; and a third sum for amount paid to weighers and guagers in 1836 and 1837, under the construction of the law given by Judge Davis and Judge Story, in the District and Circuit Courts of the United States, in the cases of William Pearce, Collector at Gloucester, and R. D. Harris, Navy Agent. These items had to pass through the subordinate accounting officers, and the question of allowance of these items was there raised.

The Secretary of the Treasury (as is stated by him in his letter to Hon. James K. Polk, Speaker of the House, Feb., 1839, No. 180) "not possessing, by law, any authority to settle said accounts, or interfere and control the adjustment of any allowances claimed, left the accounting officers and the Solicitor to discharge their respective duties in conformity to the acts of Congress, as applicable to all the facts of the case."

Mr. Henshaw urged the adjustment of his accounts, and correspondence to that effect was had with the Department, and with the President. On the 15th of November, 1838, the First Auditor (Mr. Miller) made his report to the Comptroller of the Treasury, at which time he had no knowledge of the origin of the deposit, and no official notice that the United States, by instruction of the Treasury Department, had sued the Bank and its sureties on the deposit bond, for this same sum of $65,941. In his letter of November 15, 1838, the First Auditor says, "I may, perhaps, not fully understand the whole transaction, and, therefore, do not wish to attach any blame to Mr. Henshaw. All I mean to say is, that, from my understanding of the case, I found it so much involved in difficulties, that I did not feel authorized to give the credit claimed by Mr. Henshaw."

It is obvious, that the First Auditor must have been entirely ignorant of the fact that Mr. Henshaw had made no deposits since the suspension, and that the balance in the Bank was the proceeds of the credits to Mr. Henshaw, placed there directly by the Treasury Department. Had he understood this part of the case, it could not, in his or any man's mind, have been involved in the slightest difficulty.

On the 9th of February, 1839, the Auditor made a further statement to the Comptroller, to whom the accounts had been referred, as follows:

"*Treasury Department, Feb.* 9, 1839.

"Sir,—In my letter to you of the 6th instant, in relation to the balance on the "account of David Henshaw, Esq., and enclosing a copy of my letter to the Secre- "tary of the Treasury, of the 16th of November last, I stated I had received no "reply to that letter. I should have stated, however, further, that I did receive a "communication from the Solicitor of the Treasury, to whom my letter had been "referred, informing me that the District Attorney had included the sum of $65,- "941 77, which was to the credit of Mr. Henshaw, in the Commonwealth Bank, "in the judgment taken in favor of the United States against the Bank. He also "sent me a copy of a letter from the Secretary to him, *instructing him to advise the* "*District Attorney to include in the judgment, the sums to the credit of the Collector* "*and disbursing officers*, as well as that to the credit of the Treasurer. Still, how- "ever, as both the Solicitor and the Secretary were silent as to whether the taking "of this judgment was to be regarded as a collateral security or an entire discharge "of Mr. Henshaw, I thought the safest course to decline giving the credit claimed "by Mr. Henshaw, until further advised upon the subject.

"Respectfully, &c.

"James N. Barker, Esq." J. MILLER."

The accounts of Mr. Henshaw still remaining unsettled at the Treasury Department, he again wrote to the Comptroller, under date of December 2d, 1839, restating the origin and effect of the item of deposit in his account, as follows:

Extract of a letter from D. Henshaw, to the Comptroller, Dec. 2, 1839.

"In relation to the first item, $65,941 77, which has been the subject of former "frequent communications with the Treasury Department, I have to remark that I "am entitled to a credit upon the principle admitted in the First Auditor's letter to "the Secretary of the Treasury, of November 15, 1838. *The Auditor, however,* "*misapprehends the facts, in supposing that I made frequent deposits of bank paper* "*or bank credits, in the Commonwealth Bank, after I was notified that it ceased to* "*be a deposit bank.* The only sums thus deposited to my credit, were $30,500, "placed there to my credit by the Department on its own motion, and $12,000, a

"check on the Bank itself, to aid in paying the fishing bounties, and which was "appropriated for that purpose." [For the whole of this letter, which fully explains every item of the account, see Appendix No. 9.]

It thus appears that no liability whatever could attach to Mr. Henshaw for deposits not made by him after the Bank suspended, but placed there to his credit as Collector, by the Treasury Department; and in this connexion will be seen the gross injustice and falsity of charging upon Mr. Henshaw, as a fraud upon the fishermen, the payment of bounties from the very funds expressly furnished him for that purpose.

We have now shown that David Henshaw was not in any relation, manner or form liable for the deposit of sixty-five thousand dollars,—

First, Because it was no part of any deposit made by him after the Bank ceased to be a deposit bank.

Second, Because it was passed to his credit as Collector, by the acts and orders of the Treasury Department, subsequent to the suspension, and was a transfer to him of Treasury credits.

Third, Because, by the express instructions of the Secretary of the Treasury, (Jan. 24, 1838,) and of the Solicitor of the Treasury, (Feb. 9, 1838,) the District Attorney commenced suits against the Commonwealth Bank and its deposit sureties, to recover this deposit of sixty-five thousand dollars, as "*covered by the bond executed on behalf of the Bank.*"

Either one of these reasons is an ample, legal, equitable and moral defence to any claim for that sum upon David Henshaw or his sureties, as Collector. But there is a *fourth* still stronger; and that is that the United States, by direction of the Secretary and Solicitor of the Treasury, and through its officer, the District Attorney, acting under that advice, actually took and recovered judgment against the Bank for this sum of sixty-five thousand dollars, and had the judgment satisfied.

This appears by documents. The First Auditor in his letter to the Secretary of the Treasury, of Nov. 15, 1838, (House document, No. 180, February, 1839,) says, "I "now understand that a judgment has been taken in favor of the United States "against the Bank, including the above sum (of $65,941 77.) I presume, that if it has "been taken under the direction of the Department, unless taken as a collateral secu- "rity with the consent of Mr. Henshaw, it will release him; and that, *as a matter of* "*course, he ought to be credited for the amount on his account.*"

The 27th of November, 1838, the Solicitor of the Treasury informed the First Auditor "that judgment was recovered against the Bank, on the 19th of May, 1838, for $325,517, which is understood to include the whole sum due from it," [embracing the sum in question, of sixty-five thousand dollars.]

The Solicitor also sent to the Auditor Mr. Woodbury's instructions of January 24, 1838, to prosecute the sureties of the Bank on the bond of Feb. 14, 1837, for all the balances of public money placed there by collecting and disbursing officers; also a letter from Mr. Mills, the District Attorney, of January 29, 1838, to the Solicitor, giving the items of the Bank account, including the sixty-five thousand dollars deposit, to the credit of the late Collector, and informing him that it will be necessary to bring a new action, if it is intended to recover upon the bond the whole amount deposited or "placed there by collecting and disbursing officers."

And in reply to this, the letter of the Solicitor to Mr. Mills, of February 9, 1838, enclosing a certified copy of the bond of February 14, 1837, and instructing him to sue upon it for all moneys or funds belonging to the United States, or deposited by any of its officers, which was accordingly done, and a new action brought to cover the whole amount.

On the 28th of September, 1838, the Comptroller was furnished with the certificate of the District Attorney, that under the instructions of the Department, "the sum of $65,941 77, which stood to the credit of the Collector of the port of Boston, in the Commonwealth Bank, January 12th, 1838, was included in the judgment for $325,517, recovered by the United States against the Commonwealth Bank."

And on the 8th of February, 1839, the Comptroller, "in reply to inquiries proposed in a resolution of the House of Representatives, 28th of January, 1839, in relation to the accounts of David Henshaw," cites the opinion of the Auditor, that the $65,941,

"*ought, as a matter of course, upon the above facts, to be credited to Mr. Henshaw,* "*in the settlement of his accounts.*"

So that every accounting and advising officer of the Treasury Department concurred in the correctness of withdrawing the sixty-five thousand dollars from the debit of Mr. Henshaw's accounts. But as the nominal balance against the late Collector at the Auditor's office, stood at $80,272, embracing items of disbursement, and especially the item of $9,120 which had been paid out to the weighers and guagers, in 1836–37, upon the ground that the limitation act of 1836, concerning fees, was not retrospective, as to fees already earned; there was a delay in the adjustment of this account, until 1841.

The 2d of December, 1839, as has been seen by his letter of that date, [Appendix 9,] Mr. Henshaw wrote to the Comptroller, urging an adjustment of his accounts, and stating the grounds of his claims to all the items withheld from his credit. In regard to the main item of sixty-five thousand dollars, he then said, what is apparent from the above documents, that "the United States never had any claim on him for the solvency of the Bank, or the payment of this money held by the Bank, either in law or equity;" and he cited the decisions of the United States' Courts, which covered all his payments to the Weighers and Gaugers.

Finally, Mr. Henshaw was so desirous of closing his accounts, that, to avoid longer delay, he preferred that a suit should be commenced by the government against him, which was done, for the adjustment of the disputed balances, by a judicial decision.

This action was tried in the District Court of the United States, before Judge Davis, in December, 1840. The United States claimed in the writ the sum of seventy-five thousand dollars, as due from Mr. Henshaw, and under the directions of the Court, the jury returned a verdict entire for Mr. Henshaw, as follows:

"United States, vs. David Henshaw. The jury find that the defendant did not "promise in manner and form, as set forth in the plaintiff's writ.

"JOHN HARRIS, *Foreman.*"

Upon a hearing before Judge Davis, on matters of law, the Court sustained the verdict as to the sixty-five thousand dollars deposit, and every other item of charge, except the sum of $836 25 of the amount paid to the Weighers and Gaugers. Preferring to pay this small amount, rather than incur the delay and expense of an appeal to the Circuit Court, Mr. Henshaw submitted to judgment for that sum, by default, and immediately paid it over to the United States. It was refunded to him by the officers who had received it, and they applied to the Department, by which it was referred to the auditing and accounting officers, and by them was subsequently audited and allowed; thus sustaining, by these formal decisions, the position taken by Mr. Henshaw when he retired from office, in January, 1838.

The evidence of this disposition of the whole matter, will be seen by a copy of the record of the Court. [See Appendix, No. 10.]

The account was thereupon closed at the Department, and Mr. Henshaw was furnished with the following receipt in full of all demands:

"*Comptroller's Office, March* 30, 1841.

"SIR,—Your accounts of the Customs have been finally adjusted and closed on "the books of the Treasury.

"Very respectfully, your obt. servt.

"J. N. BARKER, *Comptroller.*

"DAVID HENSHAW, Esq.
"*Late Collector, Boston, Mass.*"

We have thus traced this important item through all its phases, and brought Mr. Henshaw out of his accounts with the United States, and his deposits in the Commonwealth Bank, with the endorsement of the U. S. Court and the U. S. Government, that he has accounted for every dollar of his personal and official liability.

The delay attending this settlement, (which is in no way attributable to Mr. Henshaw;) its examination by every legal and accounting department of the government; its reference to congress, under a resolution of inquiry, of January 28th, 1839; its judicial investigation by the court and jury, and their verdict and judgment; its final adjustment in 1841, when the political friends of David Henshaw had gone out of power, and his political opponents had come in; and the fact, that, during the whole of this period, the secret accusers and personal enemies of Messrs. Mills and Henshaw, (through whom these exploded charges have recently been revived, to operate upon the Senate,) were besieging the President, the heads of Department and Congress, in every possible form, in order to fix upon somebody some charge of fraud, or contrivance, or mismanagement in these proceedings, (in all of which they failed,)—completely demonstrate that no public officer or private individual could pass through such an ordeal, but by the force of integrity, accuracy, and uprightness in his business transactions.

In all the legal proceedings connected with this settlement, it will be perceived that Mr. Mills, the United States' District Attorney, conducted with professional promptness and fidelity in the discharge of his duties, under the direct instructions and sanction of his official advisers.

The third and only remaining branch of the inquiry, *is the relation of David Henshaw to the Warren Association*, and through that to the Bank and the United States, in what is flippantly called the "SOUTH BOSTON LAND FRAUD." This charge, which has been reiterated with great boldness but little responsibility, is, in substance, that David Henshaw was a member of a private association, unincorporated, which had purchased lands at South Boston, and borrowed $180,000 of the Commonwealth Bank; and that it was fraudulently contrived, by Mr. Henshaw, that the lands of the Warren Association should be appraised and set off to the United States, in payment of that debt, so as to defraud the United States, by a corrupt appraisement, out of some hundred and forty thousand dollars.

The mere statement of this charge shows that it necessarily involves the corrupt conduct or acquiescence not only of Mr. Henshaw, but of all who participated in and were knowing to that transaction; together with wilful perjury on the part of the sworn appraisers.

It would be sufficient with men, who, possessing personal integrity themselves, are capable of appreciating it in others, and who know the character and standing of those who must have been the accomplices or tools of David Henshaw in this pretended fraud, to give their names as a full answer to this allegation; but as the purpose of this inquiry is to meet the calumnies that have been so widely and pertinaciously circulated, in every tangible form in which they have been presented, this charge will also be examined in detail.

By the preceding proofs, Mr. Henshaw stands disconnected from all liability to the Commonwealth Bank or to the United States. He was a member and one of the Directors of the Warren Association. The Directors were Messrs. Mark Healey, David Henshaw, Thomas Curtis, Hall J. How, Henry Upham, Ebenezer Jones, and J. L. Sibley. The Trustees, John Pickering, H. J. How, E. Jones, J. L. Sibley, and Charles Hood, who was also Treasurer, and James W. Fenno, Clerk. There were articles of agreement of the Association, one of which was a stipulation and prohibition that no officer of the Association should borrow money or incur debts, without a resolution to that effect. The number of shares was five hundred, at $250 per share, of which Mr. Henshaw held twenty, say $5,000, about four per cent. of the capital; so that his share of the debt due from the Association to the Bank, would have been about $6,400, the Association having paid all its debts.

The substance of the charge, therefore, is, that for this inconsiderable interest, David Henshaw not only committed a gross fraud himself upon the United States, but induced, several persons, esteemed of the highest integrity among the lawyers, merchants, judicial officers and citizens of Boston, to become his instruments in this fraud, and even to perjure themselves to accomplish his purpose!

Now the only pecuniary interest Mr. Henshaw could have had, in his relation to the Warren Association, was to relieve himself and his friends from its debt to the

Bank. For the purpose of implicating him in the failure of the Commonwealth Bank, it is assumed by his libellers that he had unlimited control over it. The Committee of the Legislature of Massachusetts, that examined the Commonwealth Bank, in their report say, that "The Warren Association have had the same access to the moneys of the Bank as though the Bank had been their Treasurer instead of Mr. Hood." Whether this were so or not, the Treasurer of the Association was the Cashier of the Bank, and its President was a Director in the Bank.

Assuming then, with Mr. Henshaw's accusers, that his purpose was to make the best terms for the debt of the Association, and which he had a right to do, would not ordinary sagacity have suggested an arrangement through this channel, rather than the course taken of a surrender of the notes of the Association to the United States' officer, to abide the judgment in favor of the United States, should it be obtained against the sureties of the Bank, and the subsequent transfer of the lands of the Association to the Bank, that the United States might levy upon them?

There was ample time (between the failure of the Bank on the 11th of January, and the first suit brought by the United States, which was the 22d of January) to have negotiated this matter. The evidences of the debt of the Association to the Bank were transferable by endorsement, and were easily adjusted by compromise, or settlement, if there had been any design of collusion or evasion. Or if the Warren Association had taken no steps and left their paper with the Bank, the result could only have been that if the Bank or its receivers should succeed in recovering judgment against the Association, it must end in a levy upon the lands of the Company, which by the laws of Massachusetts could not have been sold on execution; and this was precisely the thing that was done, in the settlement with the United States, and out of which all the complaint has grown.

In the first case supposed, viz., a recovery by the Bank against the Association, the law of the State would have required the lands to have been set off upon execution; and in the other case the same thing was done by consent of parties, and which could not have been done without such consent.

Finding so little of motive for fraud in this transaction, let the facts be examined that bear upon it.

It will be seen that there never was any relation of debtor and creditor between the Warren Association and the United States, nor did the United States ever hold a note of the Association it could put in suit.

The Warren Association was a private company of individuals, owning a large real estate in South Boston, held by certain gentlemen in trust for the Association. The Bank, at the time of its failure, held the paper of the Treasurer of the Association, Mr. Hood, to the amount of $180,000. Twenty thousand dollars of this sum was paid after the failure, which reduced the debt to $160,000.

The origin of this debt, though it was never attempted to be evaded by the Association or any of its members, made it of no binding legal force upon the Association or its individual members, because it was contracted without a vote of the Association, in violation of its terms of agreement, and with the full knowledge on the part of the officers of the Bank, of the want of authority.

So far from availing themselves of this defect in authority, the Directors of the Association, and Mr. Henshaw in particular, were at all times ready to assume it as a debt between them and the Bank, but not in any relation to the United States, for none such existed.

In his reply to the report of the Committee of the Massachusetts Legislature, in February, 1838, touching their investigation into the affairs of the Warren Association, Mr. Henshaw said,—"Before going further, I will here remark that, notwithstanding the obloquy attempted to be thrown upon the Association, by the committee and others, I challenge them all to point to a single dishonest, dishonorable or disreputable act, justly chargeable upon it. It is true that a debt had accumulated in its name at the Commonwealth Bank, but not by its authority nor at its request, for $180,000, not for $263,000, as the committee have falsely stated. Though this debt was mostly, if not entirely, created without the authority of the Association, and it does not consider itself legally bound to pay it, yet, as it is believed that those who created it

" acted from perfectly honest intentions, *no attempt, to my knowledge, has ever been* " *made by the Association to evade it.*"

The extent of the debt which had been contracted without authority of the Association, was made known at a meeting of the Directors of the Association, in November, 1837, and though much surprise was felt at the amount, they finally authorized the issue of three notes of $25,000 each, by the Treasurer, on time, to each of which was appended the votes of the Directors. One other note of $25,000, and two others of $30,000 each, were subsequently made, in all $160,000, on time from seven to sixteen months, and it was then agreed that these notes should be substituted for the memorandum checks and short paper, which the Bank held upon the sole voucher of the Treasurer of the Association. Before this was carried into effect, however, the Bank failed, and the question then came up upon the exchange of this paper according to the previous understanding.

It was in relation to the exchange of these notes for the old paper, that Mr. Mills testified, before the legislative committee, to an interview between himself and Mr. Henshaw, which testimony has been attempted to be distorted into an imputation upon him. Mr. Mills was applied to, to sanction that negotiation, solely in his capacity of Director of the Commonwealth Bank, and with no reference whatever to any debt due the United States; for at that time no suit had been commenced for the United States against the Bank. The transaction was exclusively between the Warren Association and its creditor the Bank. The exchange of the new notes on time, for the Treasurer's paper was authorized, in pursuance of the previous agreement of November, and was effected on the 15th of January, the day of the first interview testified to by Mr. Mills.

At this time, neither Mr. Henshaw nor Mr. Mills doubted the validity of the new notes; but upon subsequent examination, the authority of the Directors, under the terms of the copartnership, was called in question, as affecting the binding force of those notes upon the stockholders, who contested their liability. Mr. Mills afterwards had a conversation with Mr. John Pickering, one of the Trustees, and consulted eminent counsel, Mr. B. Rand, and came to the conclusion that the authority upon which the new notes were given was doubtful, and might be contested by the individual stockholders, in the event of a suit by the Bank against them individually. It was in the course of the discussion as to the individual liability of the stockholders, that the suggestion was made by Mr. Henshaw to Mr. Mills, that even admitting there was an individual liability, the result of a suit by the Bank to collect the debt, could only be to take the lands of the Association instead of the personal property of the stockholders, which might be put in a situation to have no claim upon it. Subsequent investigations prove that Mr. Henshaw was correct in the view he took of the doubtful liability of the stockholders, and this whole matter was afterwards fully explained by Mr. Mills, in his communication to the Solicitor of the Treasury, of September 15, 1838, which will hereafter be referred to for another purpose. [See Appendix G.]

Mr. Mills there says: " At the time the legislative committee made their investi- " gation, I was of the opinion that the associates were personally responsible for the " notes, (that is, to the Bank.) But facts were soon after disclosed, or came to my " knowledge, that very much diminished my confidence in that opinion. As a gene- " ral principle, all the members of a joint stock association are personally responsible " for the debts of the company. But in this case, I was well satisfied, on examina- " tion, that the officers of the Association were prohibited from borrowing money or " incurring debts beyond the sum of thirty thousand dollars. Such restriction it is " not supposed would avail to defeat the claim of a creditor who had no notice of it. " But all these notes were taken by the Commonwealth Bank, with full notice that " the Treasurer of the Association had no authority to contract the debt. I do not " pretend that a recovery against the Association was entirely hopeless, but I do say, " that it was so very doubtful that no prudent man, standing in the same relation, " would have sought his remedy by a law-suit, if he could receive his debt in lands " at an appraisal."

The same legal opinion was subsequently given by Hon. Rufus Choate, who, at

the request of the Solicitor of the Treasury, was designated by Mr. Bancroft, the successor of Mr. Henshaw in the Collector's office, as counsel to be consulted in behalf of the United States. In his communication to the Solicitor, of Nov. 22d, 1838, Mr. Choate says on this point:

"I consider the question, whether the Commonwealth Bank could enforce the "notes signed by the Treasurer of the Warren Association, as attended with great "difficulty. The highest professional opinions were divided upon it. The agents "of the Association, who executed and delivered the notes to the Bank, exceeded "their authority in that act, and the agents of the Bank who received the notes and "made the advances on them, were perfectly conusant of this excess of authority "of the agents of the Association. They were so because they were themselves "officers in the Association and in the Bank. The stockholders in the Association "had determined to contest their liability, and would have been charged, if at all, at "the end of a very long and expensive litigation. The sureties of the Common-"wealth Bank, who received these notes from the Bank, stood upon no higher equity "than the party from whom they received them, and would have had the same diffi-"culty, precisely, in enforcing them against the Association." [See Appendix H.]

But in addition to this legal uncertainty, the notes of the Warren Association, whether binding or not on the stockholders, were like any other negotiable paper, held by the Bank from its debtors, on time, transferable at any moment to any of the creditors of the Bank; and there was no process by which the United States could reach them. Some of them had sixteen months to run, and none less than seven, and if the United States had waited for its share of the proceeds of these notes, when reduced to assets of the Bank, either by the Bank itself or its receivers, it must not only have run the risk, in the mean time, of a transfer to others, a settlement, or even the failure of the Bank to hold the Association after a contested suit on the grounds of their defence; but had the Bank or its receivers succeeded in getting a judgment against the Association, the avails would have been realized, after all, in an appraisement of these same South Boston lands, set off on execution; which would have been doing, at great risk and cost, just what was done, in the final adjustment, without either.

And in this connexion it may be proper to correct the false view of many, as to the priority claim of the United States. The notion seems to be held by some who complain in this matter, that the moment the Bank failed, the United States could walk in and apply all the assets, negotiable or otherwise, to the discharge of its debts. This is not so. The United States stands like any other creditor, until it obtains judgment against its debtor, and even then, its priority claim to the debtor's effects applies only where by law, or by the act of the debtor himself, his property is sequestered for the use of his creditors, and not where there is mere insolvency or an individual attachment of the debtor's goods. And if, before the right of preference accrues to the United States, the debtor, bona fide, conveys his estate, or mortgages it to secure a debt, the debtor is divested of his property, and it is not liable to the United States.

The United States, therefore, stood in the same relation to the Bank, as to its negotiable paper, as did any other creditor, and no better. It had claims against it for $338,797. Of this, $146,476 were deposits to the credit of its officers, for which it had no claim on them, and the remainder, $192,321, rested upon the Bank and its sureties, as did in fact the whole sum. The only security the United States held was the deposit contract entered into by the Bank July 15, 1836, "to discharge all the duties and services prescribed by the act of the 23d of June, 1836," and a subsequent bond, executed by the President and Cashier of the Bank, Feb. 14th, 1837; upon which bond Hall J. How, Otis Rich, John Henshaw, Elisha Parks, F. S. Carruth, William Freeman, Oliver Fletcher, Adams Bailey, and, we believe, S. S. Lewis, were sureties, for the performance of the deposit contract of July 15, 1836. The sureties on this bond contested their liability on the ground that the bond was not duly executed; and they further contended, that if the bond were valid they were liable for no more than the balance of deposits remaining when the Bank suspended and was notified of its removal as a depository, May 18th, 1837. That such was

the legal force of these instruments and no more, will be seen by the opinions of eminent counsel, to whom the matter was referred by the Solicitor of the Treasury, who fully concurred in that opinion, and which no lawyer has ventured his reputation to call in question. [See Appendix J.]

The balance for which the sureties were holden, on the 18th of May, 1837, upon this construction of the contract, was stated at $106,640, which amount was placed there previous to the removal of the Bank as a depository, but from this amount was to be deducted $49,389 06 for over draft on Pension Agent's account, leaving only $57,251 for which the sureties could in any event have been held liable.

And, in point of fact and law, the United States had no security, beyond the assets of the Bank, but for this sum. The negotiable paper held by the Bank of its debtors, could not be attached by the United States nor the debtors trusteed, because "no person can be adjudged a trustee by reason of having drawn, accepted, made or endorsed any negotiable bill, note or other security."

Until receivers were appointed, the Bank could dispose of its negotiable paper as it might see fit. That this paper did not go into the hands of other creditors, instead of being made available to the United States, was mainly owing to the exertions of David Henshaw, S. S. Lewis, and one or two of the Directors, as will be seen by reference to the letter of Mr. Lewis, concurred in by Robert G. Shaw, Esq. [Appendix No. 11.]

The Commonwealth Bank was indebted to the associated Boston banks $205,000, and in fact negotiations had been started to deliver to them the securities, which, instead of that disposition, were made available to the United States, mainly through Messrs. Henshaw and Lewis.

It is not a little remarkable that the whole of the censure which has been lavished upon David Henshaw, is based chiefly upon the very proceedings which enabled the United States to realize these securities, and obtain satisfaction of its whole debt. instead of being left, as it otherwise would, to the claim of $57,000 upon the sureties, and the doubtful proceeds of the effects of the Bank.

An attempt was made by private creditors of the Bank to divert these securities from the United States. The failure of that suit, and the disposition made of the funds, will be seen by the answer of Mr. Lewis, who was sued as Trustee. [Appendix No. 12.]

The legal proceedings instituted on the part of the United States, by direction of the Treasury Department, to recover the claim against the Bank of three hundred and thirty-eight thousand dollars, were as follows:

Under instructions from the Treasury Department, on the 22d of January, 1838, a suit was commenced by the District Attorney against the Bank, and the sureties on the bond of February 14th, 1837, to recover a balance then stated in a Treasury Transcript sent by the Solicitor to the District Attorney, as due from the Bank to the United States of $51,749 90.

The District Attorney, entertaining a legal doubt, which subsequently proved well-founded, whether an action would lie against the Bank, upon the above bond, commenced, at the same time, an action against the Bank for money had and received; a measure of precaution which evinced the professional fidelity of that officer. Upon these two writs of January 22d, the officers of the Bank delivered to the District Attorney, as security for the claims, the paper of the Bank to the amount of $42,420, viz., notes of J. Henshaw and Henshaw, Ward & Co., endorsed by D. Henshaw, for $27,420, not due, and a note of How and Jones for $15,000, also on time. The Treasury Transcript stated the balance at $51,749 90, but it was in fact but $39,636 93.

These notes were subsequently paid, dollar for dollar, and the United States received the proceeds, in the final settlement. The receipt given for them on the 22d of January, shows that they were held solely for security of the balance named in the Treasury Transcript upon the writ of that date. [See Appendix D, Note *a*.] In this respect there is an error in the report of the committee of the Legislature, (page 34,) which mentions but one suit against the Bank, when in fact there were three. The error, however, is not material. Suits were also commenced against the sureties of

John K. Simpson, on his pension bonds of January 30, 1834, and February 12, 1836.

On the 30th of January, upon further instructions from the Treasury Department, separate suits were commenced against each of the sureties on the deposit bond, with directions to the Marshal to attach sufficient; and on the 13th of February, an action was brought against the Bank on its deposit contract, upon which writ all the real estate belonging to the Bank, was attached. A bill in equity was also filed against the debtors of the Bank. It is proper to state that each of these suits was promptly brought by the District Attorney, immediately upon his being furnished with the contracts upon which they were declared.

We now come to the first act of David Henshaw which connected the notes of the Warren Association indirectly with the claims of the United States upon the Bank. It will be recollected that he was not a party to these or any suit ever commenced by the United States to recover its claims upon the Commonwealth Bank. Ample security had been given to the District Attorney for the balance upon the Treasury Transcript of $39,636, which in fact reduced the claim against the deposit sureties to $17,615. After the service of the writs against the sureties, the Directors of the Bank, by vote, placed notes, to the nominal amount of $280,000, in the hands of the sureties, "to protect the said sureties against all *legal* liabilities to the United States on account of said Bank." These securities were placed by the sureties in the hands of David Henshaw and Samuel S. Lewis as trustees, for the above purpose, and were by them delivered to the Marshal upon the writs against the several sureties on the deposit bond, for the sole and express purpose set forth in the Marshal's receipt therefor, of February 2, 1838, to be held by him "as security to satisfy any judgment which may be recovered in favor of the United States, (on the said writs of January 30, against the several sureties upon the deposit bond,) the balance, after satisfying such judgments, if obtained, to be returned to said Lewis and Henshaw." [For the Marshal's receipt and schedule of notes, see Appendix D, Note *d*.]

These notes were all on time, and could not have been attached by the Marshal; they never came into the hands of the District Attorney, and the United States had no claim upon them, except as collateral to be applied as above, in case the United States recovered judgment in the contested suits against the sureties; and they could not be applied to any judgment or demand against the Bank. Among these securities were the six notes on time, of the Warren Association to the Bank, amounting to $160,000, and this is the only claim the United States ever had upon them; and even these notes, thus held as collateral for a specific purpose, were contested by the Warren Association upon grounds already stated.

Had the matter rested here, no pretext could be raised against the proceedings, as in all respects honorable and extremely favorable to the United States. But if the parties had so been left to pursue their legal remedies, the most favorable result, which, in any possible event, the United States could realize, would have been a recovery of judgment against the sureties for the deposit balance in Bank, May 18, 1837, of $57,251, less $38,636, already secured under the suit of January 22d, with the contingency of the recovery in a suit in the name of the Bank, against the Warren Association, upon these contested notes. Instead of this, by the arrangements subsequently made, the United States had set off to it, on execution, the South Boston lands; and no man, however extravagant he may be in depreciating those lands, will venture to place them at a less value than the whole amount it is obvious the United States would have recovered, had it pursued all its legal remedies to their final results.

It was at this point, and under these circumstances, that the adjustment was made, not by David Henshaw, but by the officers of the United States, under advisement with the department, and in due course of law, which led to the transfer to the United States of the South Boston lands. As has been well said, by one of the ablest law officers of the government at Washington, this settlement is not to be regarded in the light of a compromise, but as the result of legal proceedings, the most favorable to the United States that could have been obtained under all the circumstances.

The proceedings of the law officers of the government, in relation to the notes of

the Warren Association, are minutely set forth in the full report of the District Attorney to the Solicitor of the Treasury; for which, see Appendix D. With the concurrence of the Solicitor, the agreement referred to in that report, (Note *b*,) was made, May 11, 1838, between the Bank and the sureties, and the District Attorney.

By that agreement judgment was to be rendered for the United States against the Bank, for the whole balance claimed and interest, $335,517 55. The Marshal was to levy the execution upon the lands of the Warren Association, which were to be conveyed by them to the Bank, and the same were to be set off, upon the levy, by appraisement, in the legal mode of taking the land of individuals or unincorporated companies. The amount of such appraisal was to be appropriated, (in conformity to the conditions upon which the Marshal held the notes of the Warren Association,) to the relief of the sureties of the Bank on the deposit bond of February 14, 1837, to the extent of such appraisement; and the notes, held by the Marshal under his receipt of February 2, 1838, upon the several writs against the sureties, were to be surrendered to the Trustees of the Warren Association, to the amount of said appraisement, and the remainder retained, after the completion of the levy.

At the next term of the Court, judgment was entered as above, and appraisers were appointed in conformity to the laws of Massachusetts, the Warren Association having simultaneously conveyed the lands to the Bank.

The selection of the appraisers was such as no man who is conscious of deserving self-respect, would call in question, in this community. They were, on the part of the United States, Nathan Gurney, then a State Senator and Alderman of the city, James C. Merrill, one of the Justices of the Police Court of Boston; and on the part of the Bank, Amos Binney, a representative in the State Legislature. There are few citizens in Boston, who would not have been satisfied with the appointment of these gentlemen as appraisers on their own estates. And here is the point to which all the charges against David Henshaw, or the law officers of the government must come, viz., that by collusion, corruption and perjury, these three unimpeachable citizens purposely appraised the land at an exorbitant value, with the intent to defraud the United States! for if the land had been appraised under its value, there would be no pretext of complaint, and the United States would have gained, at the expense of the Association.

To cover the baldness of this charge, it has been pretended, by the accusers of Mr. Henshaw, that the appraisers made *two* valuations, one to ascertain how much land the Association was to deed to the Bank, and the second (which was under their oaths) merely *pro forma*, and that they fixed upon the price understood to have been agreed on by the parties.

This is only another form of charging them with collusion and perjury, for they knew the law and their duty under it. This charge was met and prostrated in its origin, as will be seen from a correspondence between Mr. Mills and the appraisers, of September 8 and 14, 1838, [for which, see Appendix B. G.]

Upon private representations made to the Solicitor of the Treasury, inquiries were made of the appraisers, to which they answered, that they never made but one valuation, and that upon the land, under their oaths; that they did not examine the lands for the purpose of making a valuation before they were sworn; that they never heard of any appraisement of the lands being made when they were conveyed to the Bank, and knew nothing of the consideration in the deed of the Warren Association to the Bank; and that they knew of no intention to appoint them appraisers, until they were notified of their appointment. And they further say that they did not know of their being selected as appraisers until about an hour before they were sworn; nor until sworn, did not know the parties or the property; that they proceeded to view the premises immediately after taking the oath, and when making the appraisement did not know the amount due from the Warren Association to the Bank.

There is consequently no pretence that the appraisers were misled by any supposed understanding of the parties as to the value of the lands; and if they made a false appraisal it was designedly and corruptly, and in no other way. And to show the enormity of the charge which is made upon the integrity of these citizens, in

order to assail David Henshaw through them, we will cite the oath they took, as endorsed on the execution.

"*United States of America—District of Massachusetts.*

"Suffolk, ss.—Boston, May 17, 1838. Then and there personally appeared before "me, James C. Merrill, Amos Binney, and Nathan Gurney, and made oath that they "would *faithfully and impartially appraise the real estate* taken on the within execu- "tion in favor of the United States of America against the President, Directors and "Company, of the Commonwealth Bank.

"JOHN GRAY ROGERS,
Justice of the Peace."

And in their return upon the execution, the appraisers say, under their hands:

"We, the subscribers, having been duly sworn, have this day entered upon and "viewed the following described parcels of land, &c. And we appraise the before "described premises at the sum of $166,437 90, in part satisfaction of the said exe- "cution."

Much stress has been laid upon the fact, that the conveyance of the land to the Bank was simultaneous with the levy, and that the whole return was accomplished on the same day, and also that on the day after the levy, the Bank executed a deed to the United States! The first objection is wholly immaterial, because the convey- ance and levy were dependant on each other, under the agreement to that effect, and the time was ample for the appraisement and return; and the last was a prudent measure of precaution on the part of the District Attorney, to secure the title to the United States against any possible error in the returns, which so often defeat the technical title under an execution.

With this appraisement and payment of the debt of the Warren Association, all pretended connection of David Henshaw with the alleged "land fraud at South Boston," ends. And where can malevolence find a particle of fraud or dishonesty to soil his reputation with? A stab, to reach him, must pass through a powerful array of men who surround him, in this transaction, and all of whom he must have duped or bribed to accomplish his purpose!

And to what end? We have seen it gravely calculated and figured out in a newspaper, which has been the most active in the attacks upon Mr. Henshaw, and which boasted of having defeated his confirmation in the Senate, by exposing this "stupendous land fraud," that David Henshaw's part of the plunder, by paying off the debt of the Warren Association in this way, would actually amount to $6,200! and out of this sum he must have bought up Messrs. Choate and Mills, the counsel for the United States, and bribed the appraisers to forswear themselves!

It has been repeatedly asked, why Mr. Henshaw has not long ago demanded an investigation into these charges. The answer is that the investigation has been repeatedly made by the government, and submitted to Congress, and with a uniform result honorable to him, and to the District Attorney, and to the parties concerned. To these several investigations, has recently been added, Mr. Henshaw's call upon the Senate of Feb. 14, 1844, for an exhibit of the charges against him.

It is only necessary to bring together the repeated examinations that have been held officially in this matter, but which, with the documents, have heretofore been much scattered and disconnected, to show how completely every allegation touching David Henshaw or Mr. Mills, or any party concerned in that adjustment, has been met and answered to the satisfaction of all the law officers of the government, and of more than two committees of Congress.

The setting off of the South Boston lands, was in May, 1838. The 12th of July following, Mr. Woodbury, the Secretary of the Treasury, was informed, at the sug- gestion of Mr. William Wright, of Boston, that the government had suffered, by the alleged or suspected misconduct of its officers, in the matter of the South Boston lands. At the same time an article appeared in the Boston Times, making charges of miscon- duct. The matter was referred to the Solicitor, Mr. Gilpin, who wrote to the District Attorney, [see Appendix, A,] and received the full and explicit answer given by that

officer, [for which, see Appendix B,] and the further minute report of all the proceedings, [for which, see Appendix D.]

This was satisfactory to the law officers, but not to Mr. Wright, and on the 3d of August, 1838, he addressed a memorial to Mr. Gilpin, describing what he there termed this "stupendous cheat," [Appendix E,] and indirectly censuring the President and the Department for not making an example of the alleged delinquents. This is, in fact, the articles of impeachment in the investigation.

The Solicitor, upon learning, on inquiry, that this document was intended as official, proceeded to a thorough investigation. The views entertained by the accuser, and the want of confidence intimated in the integrity of the President, Mr. Van Buren, who did not escape censure from that quarter, may be seen by his letter in the Appendix, marked F.

July 21, 1838, the Solicitor applied to the Collector at Boston, Mr. Bancroft, for the recommendation of counsel to be employed by the government in the investigation, and that gentleman immediately recommended the Hon. Rufus Choate; and at the same time, Mr. Bancroft, with honor to himself, said to the Solicitor, in reply, "the personal purity and integrity of Mr. Mills need no voucher."

Mr. William Wright's articles of impeachment, of August 3, 1838, were referred to Mr. Mills by the Solicitor, and met the extinguishing fate which followed them, in the clear and caustic reply of the District Attorney, of Sept. 15, 1838, [for which, see Appendix G.]

This was followed by the formal written opinion of Mr. Choate upon the question submitted to him by the Solicitor, as to the correctness of the proceedings in the conveyance of the South Boston lands to the United States; [for which opinion of Mr. Choate, see Appendix H.]

Mr. Choate there says,—"The result to which I have arrived is, that the arrange-"ment entered into by Mr. Mills, was, under the embarrassing circumstances of the "case, a judicious arrangement for the government, entered into in the purest offi-"cial good faith, in the exercise of a sound discretion."

The Solicitor was again fully satisfied with these explanations, and there the matter rested. But the zeal of the accuser was not cooled. The Department not being willing to take the false facts and bad law of the accuser, he applied to Congress, and, on the 14th of January, 1839, the House voted a call upon the Secretary of the Treasury, for information comprising all matters connected with the settlement in question. Mr. Woodbury referred the inquiry to the Solicitor of the Treasury, who, on the 25th of January, 1839, replied with a full explanation of the facts and his views, which cover the whole ground of inquiry. In his letter, the Solicitor answers every essential position taken by Mr. Wright. He says,—"The grounds of the "allegations are that the United States should have proceeded against the individual "members of the Warren Association; that the real estate should have been sold, and "not extended under the execution; that the appraisement was unfair, if not fraudu-"lent; and that the agreement made by the District Attorney was an improper compro-"mise of the rights and interests of the United States. These allegations, (says the "Solicitor,) *are founded on error as to facts.*" And he adds, "that at no time has it "been in the power of the United States to proceed against the members of the War-"ren Association; that no proceedings could be instituted by the United States, on "the notes of that Association; that the real estate was extended instead of being "sold, because in no other manner could it have been made available to the United "States; that it was not the property of the Bank, and never would have been con-"veyed to it, so as to be liable to execution, except under the agreement; and that to "have done otherwise, would have been to grant to the United States better terms "than it could have gained had it succeeded in a very doubtful and complicated legal "controversy." And in conclusion, Mr. Gilpin says,—"Reviewing all the facts of "the case, as they have come to my knowledge after full inquiry, *no hesitation existed "or does exist, on my part, in expressing approbation of the course taken, as that which, "under the circumstances, was proper, in a legal point of view, and decidedly best for "the interests and ultimate security of the United States.*"

This ample refutation of the whole charges about the "*land fraud*," was commu-

nicated to Congress by Mr. Woodbury, the Secretary of the Treasury, and published by order of the House, [Doc. No. 120, 25th Congress, 3d Session, House of Rep. See Appendix I.]

Here were *three* official examinations of this matter, all resulting in the justification and approval of the parties concerned. But this did not satisfy the accuser, and he again applied to the Solicitor, in July, 1839, not for a further investigation, but for the names of those alluded to, but not mentioned, in Mr. Gilpin's report, whom he suspected as the sources of information relied upon in giving the transaction his official sanction. In this letter Mr. Wright complains "that the representations which he had made, concerning the matter, *have been discredited and set down as false.*" [Appendix K.]

This, we believe, led to no action. In 1840, however, a further attempt to revive the charges, was made through the appointment of a select committee of the House of Representatives, upon "a memorial of William Wright." The chairman of this committee was Hon. W. K. Bond, a distinguished whig member of the House from Ohio.

Mr. Bond applied to the Secretary of the Treasury, for facts and explanations, who referred the inquiries to the then Solicitor of the Treasury, Hon. Matthew Birchard; and this new legal officer, with no prepossessions in the matter, proceeded to answer the call. His reply of May 25th, 1840, is full, explicit, and direct to the point, [for which see Appendix L.]

He there says, "A difference of opinion about the value of a piece of property in "a city of the size of Boston, *is but poor matter of evidence to sustain any such im-* "*putation, or in fact any imputation touching the integrity of men of fair char-* "*acter;*" and he adds:

"In conclusion, I feel myself constrained to say, after the most careful examina- "tion of the whole correspondence, that the course of proceedings adopted by the "law officers of the government, (though attended with great and serious responsi- "bility, from which they did not shrink,) *was strictly justifiable in a legal point of* "*view; and that I cannot find in the evidence anything whatever to sustain the* "*charge that their motives were incorrect, or that there has been, in any step taken by* "*them, any official impropriety, much less the slightest ground for charging them* "*with fraud.*

"(Signed,) M. BIRCHARD,
"*Solicitor of the Treasury.*"

The select committee of Congress were satisfied, and took no further action upon the subject.

Here are, in effect, *four* official investigations, two of which have been laid before Congress and silently approved. And the whole documents show, that every officer of the government, who has been applied to on this subject, including the then President, Mr. Van Buren, the Secretary and the two Solicitors of the Treasury, one of whom, Mr. Gilpin, was afterwards Attorney General; has approved of the whole transaction in what is called the "South Boston land fraud," and set aside, as wholly unfounded, every allegation of fraud, or misconduct, which it has so pertinaciously been attempted to fasten upon the parties.

The recent acceptance of the office of Secretary of the Navy, by David Henshaw, has been made the occasion, by a few of his personal and political opponents, to revive and assail him with these *four times refuted* charges of fraud, in order to prevent his confirmation by the Senate; and a press, immediately under the influence of the principal accuser, who has so often been foiled in his malevolence in this matter, has been, in conjunction with the reckless Boston Atlas as its echo, the medium for voluminous reiterations of these *four times discredited* falsehoods. It will not do to say that there is anything new in these charges, as applied to Mr. Henshaw, instead of Mr. Mills. They are the same; for not a step in this transaction could have been taken by David Henshaw, without the connivance of the law officers, and the perjury of the appraisers; and thus the answer to the charges against them,

covers every charge in relation to the South Boston lands, which can be applied to Mr. Henshaw.

But if, after this exposition, the government or Congress, at the call of any one, are willing to go into a renewed investigation, embracing a full commission to take testimony on every point, the friends of David Henshaw, and Mr. Henshaw himself, are ready and desirous to meet it, and every other charge against him, as has been shown by his memorial to the Senate of Feb. 14th.

And here they rest the ample and incontrovertible defence of Mr. Henshaw, which will doubtless surprise many who have been led to suppose that where there has been so much assertion there must have been some proof, and that no men could be found, in civilized society, to make such charges as have been made against Mr. Henshaw, with so little shadow of evidence to support them.

In conclusion, we ask every citizen who knows how to appreciate the reputation of other men because he values his own, to say, upon this exposition, what judgment upright and high-minded men ought to pass upon the calumniators of David Henshaw? And if any Senator of the United States was influenced in his vote against the nomination of Mr. Henshaw by such calumnies, we ask him, as an honorable and honest man, to say if he is not now convinced that he has been misled, by slander, into an erroneous and unjust judgment; and for the justice of this conclusion we appeal to every man capable of an honorable sentiment.

Boston, Feb. 20, 1844.

ADDITIONAL.

While this pamphlet was going through the press, a document was received, which is printed as

"Report No. 257, 28th Congress, 1st Session, House of Representatives, Feb. 28, 1844. Read and laid on the table,"—headed "William Wright."

This is a *fifth* official investigation on account of Mr. William Wright's exquisite perception in the matter of the South Boston lands, and has resulted, like all the rest, in his discomfiture and failure to fasten fraud or a suspicion of misconduct on any one.

The Report is made by Mr. Saunders, of North Carolina, Chairman of the Committee on the Judiciary of the House, to whom Mr. Henshaw addressed his letter, which was recently published. Appended to that report are several of the documents which are published in the Appendix to this pamphlet, but the Committee on the Judiciary did not have before them many of the most important documents and facts which are given, and established by proofs in this "Refutation." The documents before them were, Mr. Mills' letter to the Solicitor, of August 6, 1838, and the accompanying papers there referred to; the oath and return of the Appraisers and the Marshal, (but not the statement of the Appraisers as to their proceedings;) and the opinion of Hon. Rufus Choate, of Nov. 22, 1838.

All the above documents are published in the Appendix to this "Refutation," but they constitute only a small portion of the evidence here collected to establish the correctness of the proceedings; nevertheless, they were sufficient to satisfy the Committee on the Judiciary, and they asked to be discharged from the further consideration of the memorial of William Wright.

This very recent report of the Committee on the Judiciary was made "upon the memorial of William Wright," the history of which is thus given. It was presented at the first session of the 26th Congress, and referred to a select committee, who asked authority to proceed to Boston, with power to send for persons and papers, and "to inquire into all matters relating to the collection and settlement of the claims of the United States against the late Commonwealth Bank." This motion was laid on the table. At the second session of the 27th Congress, (1842,) the memorial was

again referred to a select committee, who asked for the same power as above; and on motion of Mr. Saunders, power was granted to the committee "to send for persons and papers, or to take the depositions of witnesses, as to them shall seem most expedient."

Under this ample authority, a subpœna was forwarded to William Wright, the memorialist, and he was directed to insert in the subpœna the *names of such other witnesses as he might deem important!* This process put into the hands of William Wright, (the accuser-general in this matter,) the *unlimited power* to summon before the Judiciary Committee at Washington, or to take the depositions of those from whom, under oath, he could get a fact to charge fraud, connivance or misconduct upon Messrs. Mills, Henshaw, Sibley, Choate, Merrill, Gurney, Binney, Pickering, or any person directly or indirectly connected with his alleged "stupendous cheat" in the matter of the South Boston lands and the Commonwealth Bank.

Instead of doing this, the committee say, "Mr. Wright *neither attended in person, nor caused any other witnesses to be summoned before the committee;*" and the committee asked to be discharged from the memorial.

At the present session, (1844,) after Mr. Henshaw's nomination as Secretary of the Navy, this same Mr. William Wright "again memorialized Congress, insisting that the government has been defrauded of large sums of public money, which by proper steps may be recovered back;" which memorial was referred to the Committee on the Judiciary. Mr. Wright had been notified to present testimony to substantiate his charges, but, as they say in their report, "*he failed to testify or to offer any proof*, but relied upon the documents on file in the department, full copies of which were forwarded, and upon the transcripts of certain papers forwarded from the public records in Boston."

All these papers are embraced in the documents above enumerated as the appendix to the report of the Judiciary Committee.

Here was an entire failure to produce evidence on the part of the accuser.

Upon this evidence, the committee say that "the report of Mr. Gilpin, Solicitor of the Treasury, denies many of the material facts, as charged [by William Wright,] and justifies the transaction." They also add that Mr. Wright *does not profess to be able to disclose any more facts*, and they distinctly negative his main charge, viz., that the South Boston lands might have been sold by the Marshal, instead of extending the execution and set off upon them, as was done under the agreement, because, as the committee say, "the Bank had nothing whereon to levy, except the land of the Warren Association, which had been conveyed [to the Bank] with the express understanding that it was to be proceeded against by appraisement, and that in discharge of the securities of the Association, which were pledged for the indemnity of the sureties on the deposit bond of the Bank." They further say, that "the United States had no judgment against these sureties, and, as its Attorneys supposed, in all probability might never obtain one."

The final result the committee arrive at, (even without the aid of much of the most material evidence in the case, which was not laid before them, but which is found in this "Refutation,") is as follows: "And whilst partiality and corruption "may be the general rule for setting aside awards and proceedings of this kind, *from "the evidence before them the committee do not feel at liberty to draw such a conclu-"sion.* The late Solicitor of the Treasury, (Mr. Gilpin,) the law officer of the gov-"ernment, under whose supervision this whole matter had been conducted, and who "had every means of correct information, has said, in a letter to the first select com-"mittee raised on the subject, after full inquiry, he had 'no hesitation in expressing "approbation of the course taken, as that which, under the circumstances, was proper "in a legal point of view, and decidedly best for the interest and ultimate security "of the United States.' This opinion is well fortified by the report of the District "Attorney, a gentleman of unimpeached integrity, as well as by that of the Hon. "Rufus Choate, who had been engaged as associate counsel, and directed to take any "and all such legal steps as might be considered necessary to the interest of the "United States, and whose attention had been especially called to this very matter. "In his report to the Solicitor, Mr. Choate uses this strong language, thus emphat-

"ically exonerating Mr. Mills, the United States Attorney, who had conducted the "whole business, from all grounds of censure or suspicion: 'The result to which I "have arrived is, that the arrangement effected by Mr. Mills was, under the embar- "rassing circumstances of the case, a judicious arrangement for the government, "entered into in the purest official good faith, in the exercise of a sound discretion.'

"Such being the history of the transaction, the committee cannot perceive the "necessity of any action on the part of Congress. If the facts, as disclosed by the "documents, represent the matter truly, then it becomes a judicial question, whether "they disclose such a case of collusion and fraud as to call for the interposition of "the courts to set aside the proceedings. If the facts be not fully disclosed, still it "would be for the court before whom the judgment had been rendered, and to which "the writ of execution had been returned, to investigate the matter, and to take such "proceedings in that behalf as the circumstances might demand. The Treasury "Department has full power, it is presumed, to employ an agent to inquire into the "facts, if any doubt should exist as to the correctness of what is on file. So as to "the proceedings under the writ of extent, by which the United States has acquired "and holds title to the property: if not according to law, it would be a question for "the judiciary to decide. *The memorialist does not profess to be able to disclose any "state of facts which would enable Congress to decide the points in dispute.*

"In conclusion, the committee content themselves with a detail of the facts as "herein before given, and with referring to the reports made by the two legal gen- "tlemen who have had charge of the matter; and if it shall be the pleasure of the "House to take any further order in the premises, it will be in its power to do so, "from the facts as disclosed. The committee, however, do not propose anything to "be done, and respectfully ask to be discharged from the further consideration of the "memorial."

This report fully sustains all the preceding reports upon this subject, and demonstrates, over and over again, the futile pertinacity with which these now *five times refuted* charges have been pressed upon Congress and the Departments, by men who, when every power of investigation is put into their hands, and the whole aid of Congress given them to summon witnesses and collect depositions and documents from any and every quarter, are compelled to back out from even an *exparte proof* all on one side, and to *confess*, when pushed to the point of giving or producing testimony, that they "*are not able to disclose any state of facts which would enable Congress to decide the points in dispute.*"

Again we ask what judgment honest and honorable men ought to form of the character and conduct of such pertinacious and *five times discredited* calumniators? They have exhausted Congress and the Departments, and met only with distinct disproof and condemnation of all their charges. The courts are open to them, and the parties accused are as ready to meet the issue in that tribunal as they always have been the scrutiny of Congress or the judgments of honest men. But in the mean time, the libellers in these maliciously groundless allegations may thank the forbearance of those they have calumniated, that they have not been called upon for proof of their libels, in the form of judicial process, and been compelled, as the principal accuser was, when summoned before the committee of the House, to confess that they "do not profess to be able to disclose any state of facts," to prove the truth in justification.

APPENDIX

OF DOCUMENTARY EVIDENCE, ESTABLISHING THE FACTS STATED IN THE TEXT.

No. 1, page 5.

Withdrawal of funds from the Commonwealth Bank.

Commonwealth Bank, Boston, Feb. 16, 1838.

DEAR SIR,—I would state that the specie deposited was what is termed a *special deposit;* and in every instance where there was a credit or a debit to the account, the following remark is made: "Special specie deposit by D. Henshaw, Collector." With regard to the *precise* time said deposit was withdrawn from the Bank, on that day, I am not able to inform you; so far as I can recollect, however, it was between the *hours of twelve and one.* It is impossible for me to be more particular on this point, owing to the very numerous business transactions I was obliged to perform, on that day, in my duty as teller.

In answer to your question touching the testimony given by me to the committee appointed by the state, whether it was written by me or by the committee, I would say, it was taken *verbally* from me, and *written* by them. I would also state that the minutes of my testimony, taken by said committee, *were not,* to my recollection, recapitulated.

Respectfully, TH. W. COLBURN.

HON. DAVID HENSHAW.

Boston, Feb. 16, 1838.

DEAR SIR,—Yours of the above date is before me. In answer to your inquiry respecting the time I took the specie from the Commonwealth Bank, on January 11, from circumstances distinctly within my recollection, it must have been about twenty minutes past one o'clock, when I brought the specie from the Bank to the Custom House.

Yours, respectfully, PETER DUNBAR.

Custom House, Boston, Feb. 16, 1838.

SIR,—In answer to your note of this day, I have to state, that on the 11th of January, about one o'clock, I called on Mr. P. Dunbar, who was the truckman for the Custom House, to go with me to the Commonwealth Bank, and bring the specie, on special deposit, to this office. He went with me to the Bank, and we there counted the specie, amounting to $10,028 71, which was brought to the Custom House and deposited in the vault by him.

After I had returned, you requested me to withdraw from the Bank, *at two o'clock,* the remaining Treasury notes there, *which I did,* amounting to $43,350.

Very respectfully, your obedient servant,

HON. DAVID HENSHAW, *Late Collector.* ADAMS BAILEY, *Deputy Collector.*

Custom House, Boston, Feb. 16, 1838.

In answer to your note, requesting me to state at what time, and what amount of specie was withdrawn from the Commonwealth Bank, on the 11th of January, and whether the specie was a special deposit or otherwise, I have to say, that between one and two, P. M., of that day, the 11th of January, I received from the Deputy Collector, and deposited in the vault of the Custom House, the balance of special deposit of specie from the Commonwealth Bank, amounting to ten thousand and twenty-eight dollars and seventy-one cents.

I am, sir, very respectfully, your obedient servant, WM. A. WELLMAN,

Late temporary Cashier of the Boston Custom House.

HON. DAVID HENSHAW, *Late Collector of the Customs, Boston.*

No. 2, page 9.

Mr. Wellman's statement as to the notice calling in the specie checks.

Custom House, Boston, Feb. 3, 1841.

DEAR SIR,—Your note of the 2d instant, referring to my letter of the 16th of February, 1838, addressed to Mr. Henshaw, late Collector for this District, is received.

In answer to your request, that I would state the reason for my transfer to the Cashier's Department, and why I suggested to Mr. Henshaw the necessity for issuing a notice to persons holding checks against the Custom House to present them for payment, I have to reply,—that on the 9th of January, 1838, I was informed that the books and accounts of the Cashier were in disorder, and that the cash affairs required investigation; and I was requested to assume the duties of that Department. The amount of discrepancy in the Cashier's accounts was not known, and could not be ascertained satisfactorily without an adjustment of the specie checks, which had been issued and were outstanding. Accordingly, on the morning of the next day, the 10th, I notified Mr. Henshaw that the specie check account, so called, could not be adjusted without calling in and redeeming those checks outstanding. This was prior to the failure of the Commonwealth Bank, *and before I had the slightest intimation of its embarrassment*, and was done with reference only to the settlement of the accounts of the Cashier of the Custom House.* The notice referred to, was written by Mr. Henshaw on the instant of the suggestion, in my presence, and sent to the public papers.

You request me to state, "whether Mr. Henshaw had been confined to his bed for many weeks by sickness, and about how many days before the date of the advertisement he had been well enough to attend to his official duties at the Custom House." In reply, I have to say—that I am now unable to state, precisely, the time he was absent from the office at that period; but my impression is, that he came to the office on the 8th of January, being the first time for several weeks.

On the 11th of January, at the close of business, I received the balance of special deposit of specie from the Bank; and *all outstanding checks were subsequently paid by me*, under the direction of Mr. Henshaw. By reference to the records, it appears that the last check was presented and paid, by Mr. Henshaw, on the 23d of March, about two months after Mr. Henshaw resigned the office of Collector. Very respectfully, I am, sir, your obedient servant.

WILLIAM WARD. Esq., Boston. WM. A. WELLMAN.

No. 3, page 13.

Mr. Taney's instructions as to deposits.

Treasury Department, Sept. 26, 1833.

SIR,—Believing that the public interest requires that the Bank of the United States should cease to be the depository of the money of the United States, I have determined to use the State Banks as places of deposit, and have selected for that purpose, in the city of Boston, The Commonwealth Bank, and The Merchants' Bank.

You will, therefore, present the enclosed draughts of contracts to the respective Banks for which they are intended, and upon the execution of the contracts, you will forward them to this Department. You will ask the aid of the District Attorney of the United States, who will see that the several contracts are executed in due form.

The contracts being executed, you will then deposit all of the public money which may come to your hands, after the thirtieth of this present month of September, in the banks above mentioned, until the further order of this Department. You will also deposit in the said banks for collection, all of the Bonds which may hereafter be taken for the payment of duties.

You will also call on the Branch Bank of the United States, in the city of Boston, and receive from it all the Bonds heretofore given to the United States, which are payable on or after the first day of October next, and deposit them, for collection, in the aforesaid State Banks. I send you herewith an order on the Branch Bank, for that purpose.

The money received by you, and the bonds, are to be apportioned among the said State Banks, so as to divide the public deposits as near as may be among them, according to the amount of capital actually paid in.

When the contracts shall have been executed by the banks, you will forward the enclosed letters to the Collectors of Plymouth, Barnstable, New Bedford, Belfast, and Kennebunk, who have heretofore deposited the money received by them in the Branch Bank, at Boston. The collections out of Boston, not being very large in amount, they are, to save trouble and perplexity, all directed, as you will see, to be paid into the Commonwealth Bank.

You will continue to deposit as usual in the Branch Bank of the United States, until the thirtieth of the present month of September, inclusive.

You will keep a copy of the contracts executed by the banks, and from time to time advise this Department of anything you may deem material to the public interest, connected with the change of the deposits. (Signed) R. B. TANEY, *Secretary of the Treasury.*

To DAVID HENSHAW, Esq., *Collector, Boston.*

No. 4, page 13.

Mr. Henshaw's letter to Mr. Taney.

Boston Custom House, Sept. 30th, 1833.

R. B. TANEY, Esq., Secretary of Treasury. SIR,—In obedience to your instructions of the 26th, the contract with the Commonwealth Bank and the Merchants' Bank of this city to receive on de-

* This fact was not mentioned in my former note from motives of kindness on the part of Mr. Henshaw.

posit the money of the United States, have been executed. And I have the honor to enclose one with each of these banks, retaining the duplicates. These banks will give the collateral security stipulated in the contracts, to be furnished whenever required. But from their good standing and known solvency, it will probably never be necessary to require it. I withdrew the Bonds payable in October, from the Branch of the U. States Bank, where they had been lodged for collection, and deposited them in the Commonwealth Bank this day. I deviated so far from your instructions as to place them all in that bank. I had not time to divide and make out the necessary schedule of them. I shall pay into the Merchants' Bank, at the end of each week, to the credit of the Treasury, half the balance in the Commonwealth Bank. This plan will simplify the business both for the Collector and the banks. The Collector will keep, in that case, an account with but one bank, saving half the labor, and the Merchants' Bank will have an account with the Treasury only.

This arrangement is mutually satisfactory to the banks, and if there be in it any inequality of burdens or benefits, they will equalize it between themselves. I shall therefore, with your approbation, continue it as I have begun. Respectfully yours, DAVID HENSHAW, *Collector.*

Custom House, Boston, Feb. 23, 1838.

I do hereby certify that the foregoing is an extract from the copy of the original letter, as it appears on the records of this office. GEORGE BANCROFT, *Collector.*

No. 5, page 13.

Mr. Taney's Approval.

Treasury Department, October 5th, 1833.

Sir,—Your communication of the 30th ult. has been received, as also the contracts of the Commonwealth Bank and the Merchants' Bank inclosed therein.

Your proceedings relative to the deposits of the public money in those banks, as detailed in your communication above referred to, are approved by the Department.

I am respectfully, your obedient servant,

(Signed) R. B. TANEY, *Secretary of the Treasury.*

David Henshaw, Esq., *Collector of the Customs, Boston.*

Custom House, Boston, February 23, 1838.

I do hereby certify that the foregoing is an exact copy of the original letter, as it appears on the records of this office. GEORGE BANCROFT, *Collector.*

No. 6, page 14.

Mr. Henshaw to Mr. Woodbury, on balance in the Bank.

Custom House, Boston, May 23, 1837.

Sir,—I send you the weekly return, ending May 20th, showing a balance due to the U. States, of $64,321 49. This balance consists of $55,407 62, deposited in the Commonwealth Bank; $2,521, *in specie on hand*—$1,465 50 deposit, in bills, in settlement of impost on woollens, and $408, in bills; all taken before the receipt of your instructions of the 12th. Also $2,817, in sums paid to Inspectors, &c., not yet charged. I have likewise in the Commonwealth Bank, $16,500 deposit in bills, amount of duties on wool and woollens, impost and tonnage, the accounts of which are not yet made up, so as to enable me to bring them into the statement, and the difference between these sums and the apparent balance of $64,321 49, is in the fee account, which will appear on the settlement of my quarterly account. I omitted to pay anything to the credit of the Treasury, the last week, owing to the new state of things.

I shall probably collect little money on bonds, and I shall have considerable to pay, during the summer, to Light-House keepers, Light-House repairs, Revenue Cutter, Hospital, &c. I have, therefore, retained this sum to my credit in Bank, and await your instructions, either to have it so remain for these purposes, or to pay it, or any part of it, over to the credit of the Treasury, as heretofore, as you may direct. Respectfully, yours, DAVID HENSHAW, *Collector.*

Hon. Levi Woodbury.

No. 7, page 15.

Mr. Woodbury, concerning funds for Fishing Bounties.

Treasury Department, November 1st, 1837.

Sir:—I have to call your attention to instructions heretofore given, respecting the payment of allowances to fishing vessels, and request that you will conform to them in all respects, in regard to those becoming payable on the 31st of next month.

In addition to others heretofore authorized to draw upon you for those objects, the Collectors of the Districts in Rhode Island and Connecticut have received such authority. You will be pleased, therefore, to honor their drafts, provided they shall have first complied with the usual formalities respecting the returns required to be furnished you.

In the event of the funds in your hands from accruing duties not proving adequate to meet these objects, and the Department being so advised, and also furnished with the amount probably required, money will be supplied you, either by drafts upon some of the banks in your vicinity, or by the issue of Treasury notes, whichsoever may be deemed most advisable at the time.

I am, very respectfully, your ob't serv't,

LEVI WOODBURY, *Secretary of the Treasury.*

DAVID HENSHAW, Esq., *Collector of the Customs, Boston.*

No. 8, page 15.

Mr. Woodbury to Mr. Henshaw.

Treasury Department, November 29th, 1837.

SIR,—I am in the receipt of your letter of the 25th inst., furnishing an estimate of the amount of money necessary to pay the drafts for fishing bounties, authorized to be drawn upon you by certain Collectors.

The Department will send you, as soon as they can be prepared, Treasury notes and drafts to the amount of fifty thousand dollars, and the balance, say one hundred and seventy five thousand dollars, before the first of January next, on which day payments for these objects fall due.

In regard to the odd sums to which you allude, they can be paid from the funds now in your hands, or the drafts which you will be pleased to retain for that object. The Treasury notes can be paid out for the current expenses of your District, and for such fishing bounty drafts as they can be applied to. I am, very respectfully, your obedient servant,

LEVI WOODBURY, *Secretary of the Treasury.*

DAVID HENSHAW, Esq., *Collector of the Customs, Boston.*

No. 9, page 18.

Mr. Henshaw's letter to the Comptroller.

Boston, December 20th, 1839.

SIR,—The last adjustment of my accounts, as late Collector of the District of Boston and Charlestown, received from your office, dated February 25, 1839, and claiming a balance due from me of $80,272 30, has remained thus long unanswered, in the hope and expectation that you would credit me with the sums I have heretofore and now claim to have credited.

The first item is the sum of $65,941 77
deposited in the Commonwealth Bank.

The second is a balance due on my emolument account for 1829, of 1,153 85

The third is the amounts I paid to the Weighers and Gaugers in 1836 and 1837, . . 9,120 44

I do not include in these your disallowance of my commission, $530 64, charged in my account of Dec. 31st, 1837.

In relation to the first item, $65,941 77, which has been the subject of former frequent communications with the Treasury Department, I have to remark, that I am entitled to a credit upon the principles admitted in the First Auditor's letter to the Secretary of the Treasury, of November 15, 1839. The Auditor, however, misapprehends the fact in supposing that I made frequent deposits of bank paper or bank credits, in the Commonwealth Bank, after I was notified that it ceased to be a deposit bank. The only sums thus deposited to my credit, were $30,500, placed there to my credit by the Department on its own motion, and $42,000 a check on the Bank itself, to aid in paying fishing bounties, and which was appropriated for that purpose. But I deem it quite unnecessary to enter into these details; for whether or not I could originally have been held liable for the solvency of an institution selected by the government as its depository, and with which I was ordered by the competent authority to make my deposits of the public money, I clearly cannot as the case now stands. The United States sued for this money as belonging to them, and as due to them from the Commonwealth Bank. They have recovered judgment against the Bank, and I believe have got their pay or ample security.

The First Auditor, in the letter referred to, says: "I now understand that a judgment has been taken in favor of the United States against the Bank, including the above sums; and Mr. Henshaw now insists that inasmuch as the United States have taken the Bank for the deposit in question, that he ought of course to be released, and a credit given to him for the same amount. I had no notice of this judgment until recently, nor am I now officially informed under what circumstances it was taken. I presume, however, that if it has been taken under the direction of the Department, unless taken as collateral security, with the consent of Mr. Henshaw, it will release him; and that, as a matter of course, he ought to be credited with the amount on his account."

The First Auditor, on the 9th of February, 1839, admits that the judgment was taken under the

advisement and direction of the Secretary and Solicitor of the Treasury, and it certainly was not taken with my assent; nor could it be taken as collateral security in this way. The taking the judgment against the Bank for this debt, extinguished all legal and equitable claim upon me, if any had before existed; but I maintain that the United States never had any claim on me for the solvency of this Bank, or the payment by me of this money held by the Bank, either in law or equity; and the withholding this credit from me, under these circumstances, when the United States have not only taken a judgment against the Bank, but have actually received on attachment and execution the sum of about $298,000, and for the balance of about $56,000, retain ample security, I cannot but consider an act of great injustice and palpable oppression.

On the second item of credit I claim $1,153 85. I have to remark that it is simply a question whether the law, which limits the amount of fees a Collector can retain, fixes or not a *pro rata* compensation. Having before given my views to the Department on this point, it is needless to repeat them now. But I beg leave to remind you that the District and Circuit Courts of the United States, for this Judicial Circuit, have decided the principle on which this allowance is claimed to be correct, in the cases of the United States vs. William Pearce, late Collector at Gloucester; and quite recently, in the case of the United States against R. D. Harris, late Navy Agent in this place.

The Circuit Court of Illinois has also enforced the same principle in the case of B. F. Edwards, receiver of public moneys at Edwardville, Ill.; and I am informed that the Judges of the Supreme Court, at their last meeting in Washington, on an informal consultation among themselves, confirmed this principle. If any additional sanctions are required, permit me to refer to your own Department. If I am rightly informed, Mr. Thompson was allowed by Comptroller Anderson, as Collector of New York, for the first four months of 1829, $3,995 76, and Mr. Swartwout, who succeeded him, was allowed $4000 for the residue of that year. With these facts in existence, it seems harsh to refuse me the credit I claim, and hard to drive me to the expense of a judicial decision to obtain justice.

The next item of your disallowance is $9,120 44, comprising in your adjustment various sums I paid to the Weighers and Gaugers in 1836 and 1837.

The principal part of this sum, viz., $6,882 20, you aver to be surplus fees overpaid the Weighers and Gaugers of this port for the year 1836.

The manner in which you arrive at this result is this: you take the whole amount of fees earned by these officers in the year 1836, say $25,833 50

You deduct expenses, ... 8,451 30

Net earnings, 17,382 20

You then deduct for 7 Weighers and Gaugers, $1500 each, ... 10,500 00

Leaving $6,882 20

which you decline to allow. Your first error is in assuming, contrary to the facts, that there were but seven Weighers and Gaugers at this port in that year. The permanent Weighers and Gaugers for 1836, were Joseph Loring, Thomas M. Vinson, J. L. C. Amee, N. Tracy, J. M. Fiske, A. H. Ward, Theodore Dexter, James Estabrook, Samuel Walker, L. Hamilton, Ezra Mudge, John Champney and S. Cole. Col. Vinson resigned in the early part of the year, and Gen. J. L. C. Amee succeeded him. The appropriation law of 1835, fixing a maximum for these Weighers and Gaugers, expired on the 31st of Dec., of that year. The new act, limiting their compensation, did not pass until July 4, 1836. The Weighers and Gaugers in the mean time were entitled to all the fees prescribed by the acts of Congress in 1799 and 1816, as fast as they earned them. They had earned and received, exclusive of their expenses, prior to the passage of the law, $12,819 70, divided as follows: to Vinson and Amee $1,831 38½, and to Tracy, Fiske, Loring, Dexter, Estabrook and Ward, each the same sum. On learning the passage of the appropriation act of July 4, 1836, these officers resigned, except Gen. Amee and A. H. Ward. I considered the law prospective in its operation, and that Congress so intended it—that they could no more legislate these fees out of the hands of the Weighers and Gaugers who had earned and received them, under existing laws, by a retroactive law, than they could legislate your salary for years past, out of your pocket. On the resignation of these officers, Samuel Walker, L. Hamilton, Ezra Mudge, J. Champney and S. Cole were appointed. Some of these acted and were paid as temporary officers, before their appointment as permanent officers. I suppose there can be no doubt that these officers were entitled to their fees as fast as they earned them, not to exceed the *pro rata* compensation—they contend that they are entitled to them until they reach the maximum. I do not consider it necessary here to repeat what I have so often written before, on the details of these accounts. We differ radically in the principle of making them up. You contend that there were but seven offices of Weighers and Gaugers at this port in 1836, and that there were only $1500 appropriated to each office; that the appropriation law of July 4, 1836, had a retrospective operation back to Jan. 1, 1836; that I am bound to refund what I paid the seven Weighers and Gaugers over the *pro rata* or rather maximum of $1500.

I maintain that there were thirteen officers employed as permanent Weighers and Gaugers during that year; that those employed before the passage of the act of July 4, 1836, were legally entitled to receive and retain all they earned prior to that period; that those employed subsequently were entitled to their fees until they reached the maximum of $1500; and further, that if there be a refund claimed, the Department must look to the officers who received and who owe the money, and not to me for it. I am informed that the Department sanctioned this last principle in the settlement of Mr. Breedlove's accounts as Collector of New Orleans.

In conclusion, permit me earnestly to solicit your attention to my claims. I am very desirous to

have my accounts closed. The delay in settling them is a serious inconvenience to me, and I think an act of unnecessary and unmerited hardship.

Respectfully yours, DAVID HENSHAW, *Late Collector.*

J. N. BARKER, *Comptroller.*

No. 10, page 18.

Record of Judgment of the Court, U. S. vs. David Henshaw.

UNITED STATES OF AMERICA.—MASSACHUSETTS DISTRICT, ss.

At the District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the first Tuesday (being the first day) of December, in the year of our Lord one thousand eight hundred and forty. Before the Honorable JOHN DAVIS, *Judge.*

The United States of America Plff's., vs. David Henshaw, of Boston, in the District of Massachusetts, Esq., Defendant. In a Plea of the case, for that the said Henshaw, at said Boston, to wit, on the day of the purchase of this writ, being indebted to the said United States in the sum of seventy-five thousand dollars, for so much money there before that time by the said Henshaw, of the said United States, and to their use had and received, in consideration thereof promised said United States to pay them the same sum on demand. Yet the said Henshaw, although often required, has not paid to the said United States the said sum, but hitherto altogether has, and still does refuse to pay the same, to the damage of the said United States, as they say, the sum of seventy-five thousand dollars.

This action was entered at the present term of this Court, and the parties appear by their respective attornies, and the Marshal returns that he attached a chip, the property of the said Defendant, and summoned him to appear and answer at Court, by giving him in hand a summons: And now, by consent of parties, the said Defendant, although solemnly called to come into Court, does not appear, but makes default. It is therefore considered by the Court, that the said United States of America recover against the said David Henshaw, the sum of *eight hundred and thirty-six dollars and twenty-five cents,* damage, and costs of suit, taxed at eighteen dollars and eighty-two cents.

A true copy.

Attest, FRANCIS BASSETT, *Clerk.*

No. 11, page 23.

Statement of S. S. Lewis and Robert G. Shaw.

Boston, December 27, 1843.

HON. DAVID HENSHAW, Secretary of the Navy, Washington.

DEAR SIR:—Noticing in the Bay State Democrat of the 23d instant, a gross, and as I know wholly unfounded attack upon your character and integrity as a man and public officer, by charging you direct with perpetrating a fraud against the Government in the land settlement with the Commonwealth Bank,—and having held with yourself, jointly, a large amount of securities placed in our hands by the Bank to indemnify the Directors and others against the Government, I was knowing to *all* the negotiations and settlements made between the Bank and the Government;—a part of which, I effected myself.

In justice to you, I feel it to be a simple act of duty to state the facts as they existed in those settlements.

In the first place, allow me to say that the Government, instead of being injured by you, (as charged upon you,) are mainly, if not entirely, indebted to you, and to me, for all but about $37,000, of the debt recovered of the Bank, amounting to $345,517 55; for it was by our joint and persevering exertions that the Bank, after several days' hesitation, placed in our hands, as joint Trustees, promissary papers and securities to the amount of their indebtedness to the Government.

Two settlements were made between the Bank and the Government; the first by a levy on lands belonging to a land company called the "Warren Association," composed of a number of highly respectable persons of both political parties, in which you were a stockholder to a comparatively trifling amount. The Treasurer of this company was Hon. John Pickering, solicitor of the city of Boston, and one of our most eminent lawyers. The notes of this company, to the amount of $160,000, were among the securities turned over by the Bank to us, as before mentioned, and were by us given up to the United States Marshal. Subsequently, after a long negotiation between the counsel for the Bank and the U. S. District Attorney, an agreement was made between them, that the Government should receive in payment for these notes the lands of the company, by levy and appraisement. The whole transaction, negotiation, levy and appraisement were conducted by highly honorable men, all of whom were entirely disinterested in the result of the transaction, and they were all, excepting the District Attorney and the Marshal, influential members of the Whig party.

John R. Adan, Esq., counsel for the Bank, managed the negotiation on its behalf, with the District Attorney.

The appraisers consisted of Hon. Judge Merrill, Hon. Nathan Gurney, then Senator of Massachusetts, and Alderman of the city of Boston, and Amos Binney, Esq., Representative from Boston to the State Legislature; all men of high standing morally and politically, and enjoying, in a large degree, the confidence of this community. Is it to be supposed that such men would allow you, or any one, to influence them in fixing, under oath, (as they were bound to do) the true value, to the best of their judgment, upon these lands? The idea is too absurd; and yet, this supposition, as unlikely as it appears, is the only one by which I can conceive you to be benefited in the settlement, and then only to the amount of your trifling interest in the shares of the Company, by influencing the lands to be appraised above their real value; your gain would then be the excess of such extra valuation on your shares. The thing carries with it its own refutation of the base slander.

As I have said before, the counsel of the Bank made the arrangement with the District Attorney; and you are no more responsible for that settlement, than you are for the second and last settlement, which I made myself, with the Solicitor of the Treasury at Washington, and the Hon. John Mills, of which I take the whole responsibility.

But you have only, in order to set things right, to refer to the files of the Secretary, or the Solicitor of the Treasury, for the written opinion of the Hon. Rufus Choate upon the subject of the South Boston land settlement. He was employed by the Government to examine and report upon it, and I have always understood that he did so. Robert G. Shaw, Esq., one of the Commissioners associated with me in building the new Custom House in Boston, was a close observer and took a deep interest in the matter of the settlement between the Bank and the Government, and he is, I believe, acquainted with all the principal facts in the cases of both settlements.

With great respect, your obedient servant,

(Signed) SAMUEL S. LEWIS.

Boston, Dec. 28, 1843.

Dear Sir,—Our mutual friend, S. S. Lewis, Esq., has sent me the annexed letter to your address, in which he has referred to me as being acquainted with the facts therein stated. I am acquainted with what relates to the land levy, as also with many of the other statements, and believe the whole to be true.

You will allow me to add, that I have known you intimately, since you commenced business, as an honorable and upright merchant, and as an intelligent, faithful and industrious public officer, and that your integrity has never been suspected by any one who knew you.

Your friend and obedient servant,

(Signed) ROBERT G. SHAW.

Hon. David Henshaw, *Secretary of the Navy, Washington, D. C.*

No. 12, page 23.

Answer of Mr. Lewis as Trustee.

C. C. Pleas, January Term, 1842.

SAMUEL BROADWELL vs. COMMONWEALTH BANK AND S. S. LEWIS, *Trustee.*

And now Samuel S. Lewis, in answer to the interrogatories to him proposed, declares and says, that at the time of the service of the Plaintiff's writ, he had not any goods, effects or credits of the Defendant, in his hands, or possession, unless the Court shall otherwise determine from the following facts:

On the 1st of February, 1838, the said Defendant, by vote of the Directors, duly passed, transferred and delivered to the Respondent and Jno. Henshaw, Wm. Freeman, Charles Hood, Hall J. How, Oliver Fletcher, F. S. Carruth, Otis Rich, Adam Bailey, Elisha Parks, John K. Simpson, and David Henshaw, certain promissory notes, and choses in action to secure and indemnify the said parties against their liabilities for the Defendant, to the United States. This was subsequently confirmed by the vote of the Directors, subsequently passed, and a copy of which is hereto annexed.

This respondent further says, that he, together with David Henshaw, was appointed by said Jno. Henshaw and other trustees, to hold and manage the said property, and subsequently David Henshaw relinquished said trust, and the respondent was appointed sole trustee.

The amount due the United States from said Bank at the time of its failure, was $345,517 55; the amount (nominal) of the securities so transferred, was $364,011 37. Many changes, renewals, and compromises had taken place in regard to said paper, with the assent of the said Defendant, and said Jno. Henshaw and others, and the debt due the United States has been reduced to the sum of $18,546 15 with interest,* and the amount paid has been paid from the aforesaid securities. At the time of the service of the Plaintiff's writ, this was the condition of the said debt, and no change has since taken place to the knowledge of the respondent.

At the time of the service of the said writ, this respondent had nothing beside the said securities in his hands, except a small sum of money not sufficient to defray the expenses to which this respondent had been subjected, and the charges of executing the said trust, and excepting also bills

* This balance was subsequently paid, and the U. States received its whole debt, all of which was without depreciation, except the levy on the South Boston lands.

of the said Bank, to the amount of $4,427, which this respondent, with the assent of parties interested, had secured in payment of one of the said notes, so transferred to said Jno. Henshaw and others, and which the respondent took for the purpose of delivering to said Bank. Wherefore this respondent prays the judgment of said court, and for his costs.

Sworn to, &c. S. S. LEWIS.

A.

Mr. Gilpin to Mr. Mills, July 18, 1838.

Office of the Solicitor of the Treasury, July 18, 1838.

Sir,—I have this morning received from the Secretary of the Treasury a slip from the Boston Times of the 13th inst., in relation to the debt due the United States by the Commonwealth Bank, respecting which I wrote you yesterday. The statements made in that article are of so serious a character, not merely as affecting the interest of the United States, but the official conduct of yourself and the Marshal, that you will be sensible of the necessity of a prompt and full explanation of all the proceedings in this case. I have to request that this may be accompanied with full copies of the records, judicial proceedings, and written instruments connected with it.

It is not possible to believe, as is stated, either that the personal securities of the Warren Association, which formed a portion of the assets of the Bank, actually attached by the Marshal, as mentioned in your letter of the 1st March last, can have been surrendered; or what would be still more extraordinary, that under any arrangement, compromise, or color of legal proceedings, real property, which cost but two and a quarter cents a foot, and would now bring but one and a half cents a foot, should have been appraised and received by the officers of the United States at the enormous price of fifteen cents a foot.

If either of these transactions has taken place, it must be regarded as a very great, not to say fraudulent, violation of the rights and interest of the United States. Upon that ground an immediate application ought to be made to the Court, to which the execution is returnable, to set aside the appraisement, and set-off, alleged to have been made under it; taking care, however, to preserve the levy. At the same time I have to request, that, if not already done, proceedings may be forthwith instituted, either under the act of 20th April, 1818, or, what I should deem more advisable, in chancery, against the debtors of the Commonwealth Bank, including the members of the Warren Association.

In the present position of this case, the most prompt, energetic, and thorough measures must be taken without delay, to protect the interests of the United States. This is due, not merely as a matter of right to them, but for the vindication of the official character of their agents.

Very respectfully, your obedient servant,

H. D. GILPIN, *Solicitor.*

John Mills, Esq., *District Attorney, Boston, Mass.*

B.

Mr. Mills to Mr. Gilpin, July 25, 1838; *as to selection of Appraisers.*

U. S. District Attorney's Office, Boston, July 25, 1838.

Sir,—Your letters of the 17th and 18th of July current, have been received. In relation to the statement in the slip from the Boston Times, you request me to give you a "prompt and full explanation of all the proceedings in the case."

My former letters have informed you of the commencement of the suits and of the proceedings against the Commonwealth Bank and its sureties. On the first of March last, I stated the proposition that had been made by the counsel of the Bank and the Warren Association, and that I believed it would be for the interest of the United States to accept the proposition. Your answer of the 6th of the same month I considered an approval of the arrangement. About this time, Mr. Henshaw went to Washington, and had conversation with you on the subject. This I learnt by your letter of the 9th of April. To avoid any misapprehension in relation to the business, I transmitted to your office the written proposition of the counsel for the Bank. This was substantially the same as that previously communicated. In your reply (May 4, 1838,) you gave your sanction to the arrangement, "if the modes of proceeding or execution process authorized the setting off of real property by appraisal." No one acquainted with *all* the circumstances, and whose mind is free from prejudice, would doubt for a moment that this arrangement was favorable for the U. States. Suppose that judgment had been rendered against the Association on those notes, and that execution had then been in the hands of an officer, which would have been thought the wiser course, to levy that execution on the lands of the Association, agreeably to the laws in this District, or seek a doubtful remedy against its individual members? It appears to me that no creditor, having regard to his own interest, would hesitate to take the former course. I suppose then that the "fraud upon the Government," if any, consists in making the levy—the selection of incompetent, interested or dishonest men, for appraisers. By the laws in this District, one of the appraisers is to be appointed by the officer, one by the creditor, and one by the debtor. As the Marshal had formerly been a member of the Association, we both considered it improper for him to make a selec-

tion, but he agreed to appoint any one that I should designate. This gave me the selection of two. To prevent the possibility of any improper interference, I refused to give the names of the appraisers till the day the levy was made, and did not do it till 10 o'clock on the morning of that day, barely in season for the Marshal to give them notice of their appointment. I selected Judge Merrill and Mr. Gurney.

Mr. Merrill is a Judge of the Police Court, and recently Senator in the State Legislature. Mr. Gurney is an Alderman, and is now a State Senator. Their honesty and integrity have never been questioned. They are acquainted with the real estate in all sections of the city, and have been frequently employed as appraisers of land set off on execution. I am not personally acquainted with Mr. Binney, the other appraiser, but he has the reputation of being an intelligent, high-minded, honest man.

The appraisers met at the Marshal's office. I there made the enquiry whether they were members of the Warren Association, or had any interest in that concern, or in the Commonwealth Bank, and also whether there had been any recent inquiries of them respecting the value of the lands of the Association, or of other lands in South Boston. They gave a negative answer to each of these interrogatories. We then proceeded to view the lands. I remained with them the whole time. They then adjourned to meet at Mr. Merrill's office at 8 o'clock the next morning. I have since been informed by the chairman (Judge Merrill) that at their meeting each handed in his estimate, and soon fixed upon 15 cents a foot, there being but little variance in their several estimates. I am not acquainted with the value of real estate in the city, but I think the appraisal is high. I know there are others, who are good judges of the property and disinterested, who would consider it a fair appraisal.

I hope this statement will be satisfactory. Should it not be, I will endeavor to answer any particular inquiry you may make. The execution is now in the Register's office, but the Marshal will transmit a copy in his next return, or sooner, if desired.

In regard to proceedings under the Act of 20th April, 1818, as suggested in your letters, I would state, that the notes given by the Treasurer of the Association were negotiable, and were passed by the Bank to the sureties early in January. Under these circumstances, the Association, in my opinion, could not be held as the Trustee of the Bank. But if it could, if execution had been obtained against the Association on its answer, it could have been satisfied only by a levy on the real property. I am sir, very respectfully, your obedient servant,

(Signed) JOHN MILLS, *District Attorney.*

Hon. H. D. Gilpin.

C

Statement of the Appraisers.

Boston, September 8th, 1838.

Gentlemen,—Representations have been made to the Solicitor of the Treasury, that the appraisers of the lands recently set off on execution in favor of the United States against the Commonwealth Bank, made two valuations of the same. That the first appraisal was made to ascertain the quantity of land which the Warren Association should convey to the Bank in discharge of their notes, and that, after the conveyance was made, they went through "the mock ceremony" of a second valuation on the execution.

In consequence of these representations, I take the liberty of requesting you to give me a written answer to the following interrogatories:

1. Did you make more than one valuation of the lands levied on by an execution in favor of the U. States against the Commonwealth Bank in May last?

2. Did you ever examine the lands levied upon for the purpose of making a valuation of them before you were sworn as appraisers on the execution?

3. Did you, before you had fixed upon the valuation, know or hear of any appraisal of those lands being made at the time they were conveyed to the Bank, or did you know what consideration was expressed in the deed from the Trustees of the Warren Association to the Bank?

4. Did you know of any intention to appoint you appraisers, till you were notified of your appointment by the Marshal or his Deputy?

5. At what time in the day were you notified of your appointment, and how soon afterwards did you view the lands?

I think it proper to state, that I shall transmit your answer to these questions to the Solicitor's office. I am, gentlemen, very respectfully yours,

JOHN MILLS.

To James C. Merrill,
Nathan Gurney,
Amos Binney, Esq'rs.

To the annexed interrogatories, we answer as follows:

To the first, second, third and fourth, NO.

In answer to the fifth, we say we were notified of our appointment but a short time, probably not more than an hour before we were sworn, and did not know, until the time of being sworn, who were the parties or what was the property to be appraised. We proceeded to view the premises

immediately after the oath was administered. We did not know, at the time of the appraisement, the amount due from the Warren Association to the Bank.

JAMES C. MERRILL, } *Appraisers.*
NATHAN GURNEY, }

September 14, 1838.

I concur in the above answers, with one exception,—that several days previous to the appraisement I was asked whether or not I would act as appraiser in a case between the United States and the Commonwealth Bank, to which I replied that I would if appointed. No further conversation on the subject was held by the gentleman enquiring, and me, before the appraisement.

AMOS BINNEY.

September 15, 1838.

D, page 12—23.

Report of District Attorney to the Solicitor.

U. S. District Attorney's Office, Boston, August 6, 1838.

SIR,—In compliance with your letter of the 30th of July last, requesting a full report of the proceedings that have taken place in relation to the claims of the United States against the Commonwealth Bank, the District Attorney has the honor to submit the following

REPORT:

On January 22, 1838, the District Attorney received from the Solicitor of the Treasury, a Treasury Transcript stating a balance due to the United States from the Commonwealth Bank, of $51,749 90; also a copy of a bond executed by the officers of that Bank and other persons as sureties, dated February 14, 1837, with instructions to institute legal proceedings.

An action to recover the sum aforesaid was commenced against the Bank and sureties on the same day.

As there was, in the opinion of the District Attorney, some doubt whether an action could be sustained against the Bank on *that* bond, an action for money had and received was brought against the Bank at the same time. The damages were laid in each case at $75,000. No property was attached by the Marshal in either case; but, as security for this claim, the officers of the Bank delivered to the District Attorney certain promissory notes described in his receipt, a copy of which (a) accompanies this report.

On the 30th of January, 1838, a letter was received from the Solicitor, enclosing a communication from the Secretary of the Treasury, under date of January 24th, stating, that "besides the balance standing against the Commonwealth Bank, upon the books of the Treasurer, it is understood that considerable sums of public money which were placed there by collecting and disbursing officers, still remain in deposit with the Bank. As these balances are included in the liabilities of the Bank to the United States, and are covered by the bond executed in its behalf, I have to request that the District Attorney may be instructed to keep them in view in any course he may adopt for the protection of the interest of the United States. Their amount can all be ascertained at Boston." The books of the Bank were immediately examined, and the amount due to the United States ascertained. On the same day actions were commenced against the several sureties on the bond of February 14, 1837. The damages in each case were stated at $400,000. Endorsed, "Attach sufficient. J. Mills, District Attorney." The Marshal returned on the writ against Samuel S. Lewis, one of the sureties, as follows, to wit: "United States of America, Mass. District, Boston, February 2, 1838. By virtue of this writ, I have attached certain promissory notes and demands, turned out to me by Samuel S. Lewis, the within named defendant, and David Henshaw, as security to satisfy any judgment or judgments which may be recovered in favor of the United States, on this writ, or either or all of the following writs in my hands for service; severally against John Henshaw, Elisha Parks, F. S. Carruth, Otis Rich, William Freeman, Hall J. How, Oliver Fletcher and Adams Bailey. Said United States are plaintiffs in each of said suits, and the writ in each of them bears date January 30th, 1838, and is returnable to the U. S. District Court, to be holden at Boston on the third Tuesday of March, 1838. Jonas L. Sibley, Marshal." A similar return was made on the other writs. It is understood that the Marshal has in his possession a list of the securities referred to in the foregoing return, but he is now absent, and as it is with his private papers, a copy cannot be obtained till he returns. [A copy subsequently obtained is appended to this report. (d)]

On the 13th of February, 1838, a letter was received from the Solicitor, dated February 9th, enclosing a certified copy of the contract of the Bank with the Secretary of the Treasury, dated July 15, 1836. On the 23d of February, a suit was brought against the Bank on this contract. The Marshal returned on this writ that "he had attached all the lands belonging to the Bank, within his precincts."

These actions were all entered at the March term of the District Court, and all stand continued, except the one against the Bank for money had and received, commenced on the 22d of January.

The securities attached on the writs against the sureties, as stated in the return on the writ

against Lewis, were never under the control or management of the District Attorney. They never belonged to the United States. They were transferred by the Bank to the sureties as collateral security to indemnify them for any judgment that might be rendered against them as sureties to the Bank. The sureties proposed to place these claims in the hands of the Marshal to satisfy any judgment that might be rendered against them in those actions. As several of the sureties had failed, and as real estate (except about 10,000 dollars) was the only property of the solvent sureties that could be attached, it was considered to be the interest of the United States to take a transfer of these promissory notes. But it will be recollected that the Marshal did not hold these securities to respond any judgment against the Bank, but such only as may be recovered on the suits now pending against them, and in which they contest their liability. Of these securities thus transferred to the Marshal and for that specific purpose, were notes of the Warren Association, amounting to $160,000, all of which were on time. The former letters of the District Attorney have acquainted the Solicitor of the Treasury with all the negotiations respecting the manner of paying these notes. The only proposition in writing ever submitted to the District Attorney was transmitted to the Solicitor of the Treasury on the 25th of April, 1838. After the receipt of the Solicitor's letter, of May 4th, an agreement was entered into, of which the accompanying paper (b) is a copy.

It will appear by the copy of the record, in the case of the United States against the Bank, (c) that the writ was amended and judgment rendered by consent for $325,517 55. By the agreement, judgment was to be rendered for $345,517 55. After the agreement was executed, it was recollected that there was an attachment of land on the writ, dated February 23d, and, as there might be subsequent attachments of the same land on suits pending in the State courts, the balance was left for the judgment in the action of the 23d of February.

A copy of the execution, with the doings of the appraisers and return of the Marshal, is herewith transmitted. The document is marked (4). The letter of the District Attorney, dated July 28, 1838, states *all* of the facts (so far as they are known to him) in regard to the appointment of appraisers and the proceedings at the time of the levy. To that statement he has nothing to add or diminish. It seems, however, that the point on which the Solicitor of the Treasury asks particular explanation, is stated in the following extract from his letter, bearing date July 30th, 1838. "The allegations made to the Secretary of the Treasury, and from respectable sources, were, that under color of this legal process, land which was lately bought for two and a quarter cents a foot, and would now bring but one and a half cents a foot, was set off to the United States at fifteen cents a foot—thus, in fact, crediting the Judgment of the United States with $166,000, when the land was worth but $10,000; that the legal officers of the United States stood by and acquiesced in this appraisement; and that after it was made they surrendered valuable personal securities without their being legally satisfied." The District Attorney does not know the costs of this land to the Association, nor does he think it material to enquire, as they were purchased several years since, and as there have been great improvements and great increase of population in that part of the city since the original purchase. "*And would not now bring but one and a half cents a foot.*" This allegation is flatly denied, and the "respectable" person who made the communication to the Secretary of the Treasury, must plead gross ignorance upon the subject, to screen himself from the charge of malicious falsehood. "*That the legal officers of the United States stood by and acquiesced in this appraisement.*" If by this it is insinuated that the officers of the United States acquiesced in any fraudulent act, it can hardly be expected that they will criminate themselves and plead guilty to the charge. If the proceedings were legal and fair, there was nothing to which an objection could be made. On this point, the District Attorney will go no further than to repeat—that he selected two of the appraisers, men competent to discharge the duty to which they were appointed, well acquainted with the value of such lands, and whose character for honesty and integrity will not be questioned even by the "respectable" informant of the Secretary of the Treasury. "*They surrendered valuable personal securities without their being legally satisfied.*" This brings up again the question of fraud. If the transaction is fraudulent the proceedings are void and not binding on the United States. But if the lands were fairly and legally appraised at $166,437 90, why should not securities to that amount be surrendered? It could not be supposed that the United States would hold the land and securities too. After the levy was completed, the District Attorney had no hesitation in directing the Marshal to give up, to be cancelled, the notes of the Association to that amount. Nor had he any suspicion that the legality of the act was any more to be questioned than it would be had the payment been made in cash. He has never entertained or stated any proposition or arrangement by way of compromise or relinquishment of any existing liabilities, without legal satisfaction; nor did he permit the notes of the Association to be surrendered, till their full amount, of principle and interest, had been legally satisfied.

From the best information the District Attorney has upon the subject, he considers the real value of the land, set off on the execution, to be not less than twelve and a half cents a foot, but he knows it is the opinion of others, who are good judges, that the appraisement is not too high. He has not heard but a single individual (William Wright) who knew anything of the lands, estimate them at less than twelve and a half cents a foot. There is not a single circumstance known to the District Attorney that will authorize an application to the court to set aside the levy. There was no mistake or misrepresentation in relation to the lands. The appraisers had the plan before them, and they entered upon and viewed the several lots.

It appears by the Marshal's return on the execution that $169,052 49 have been paid, leaving an unsatisfied balance of $156,483 97. The damages to be rendered in the other case will not vary much from $23,000. The cash credit on the execution, was by a payment of Mr. Henshaw's

on one of his notes mentioned in the receipt. In the absence of the Marshal, the value of the securities now in his hands cannot be stated with accuracy. Their value is estimated at $105,000
Land under attachment at 15,000
Balance of notes now in the hands of the District Attorney, ... 37,420

$157,420

If this estimate is correct, and the assets in the hands of the Marshal, are, when collected, applied on the execution, it will leave a balance of $22,063 97, besides the balance of interest.

If the actions against the sureties on the bond of February 14, 1837, are sustained, and they held liable for the whole debt due from the Bank, the United States will, unquestionably, be paid in full. If, however, the sureties should be discharged, a process will be immediately instituted to retain for the United States, the securities now held by the Marshal. From these, and from other debtors to the Bank, included in the bill in Equity, it is confidently believed that enough will be collected to discharge the debt due the United States.

It will be seen that two of the notes in the hands of the District Attorney are payable in a few days, and the other, for $6000, *not till October*, 1839. Mr. Henshaw will ask an indulgence for a part of the notes payable on the 12th. Would it not be expedient to propose to him an equation of payments, by which the whole shall be paid before the first of December next? No opinion is expressed as to the time when the securities held by the Marshal will be paid. It is hoped there will be but a small balance, if any, due to the United States, on the first of January next.

(Signed,) JOHN MILLS, *U. S. District Attorney.*

To the Solicitor of the Treasury.

Note *a* of Document D.

Receipt for Collateral deposited with the District Attorney.

Received of Charles Hood, Cashier of the Commonwealth Bank, a note signed by John Henshaw, as principal, Charles Henshaw and David, sureties, dated January 10, 1838, payable in seven months, for $21,420. A note signed by Henshaw, Ward & Co., payable to David Henshaw, and by him endorsed, dated Oct. 20, 1837, for $6000, payable in 24 months from date, with interest. Also a note signed by Hall J. How, for the late firm of Hall and Jones, dated January 9, 1838, for $15,000, payable to the late firm of Henshaw & Co., and by them endorsed, payable in seven months, which notes are also endorsed by the said Cashier. The notes aforesaid I am to hold as security for a balance due from the Commonwealth Bank to the United States, of $51,749 90, as appears by the Treasury Transcript, but is only $39,636 93, as appears by the books of the Bank.

JOHN MILLS, *District Attorney.*

January 22, 1838.

Note *b* of Document D.

Massachusetts, Boston, May 11, 1838.—*United States District Court.*

The United States, *vs.* Commonwealth Bank, No. 18.

AN AGREEMENT OF TWO PARTS.

In the above entitled action it is agreed as follows, viz.:

1. The Plaintiffs' damages alleged in the writ in said action shall be increased, and be stated to be three hundred and fifty thousand dollars.

2. Judgment shall be rendered in said action in favor of the Plaintiffs, for the sum of three hundred and forty-five thousand five hundred and seventeen dollars fifty-five cents, being the amount specified in the Plaintiffs' bill of particulars, filed in said action. Execution shall issue for that sum and the costs of said suit without delay.

3. Jonas L. Sibley, Esq., the Marshal of the United States, shall levy said execution on such lands as the Warren Association or its Trustees shall convey to said Bank. In making said levy, no part of said land shall be sold by the Marshal, but the same shall be set off on said execution by appraisement.

4. The amount at which said lands shall be appraised as aforesaid, shall be appropriated to the relief of the sureties of said Bank, in a bond made to said United States in the penal sum of five hundred thousand dollars, by John K. Simpson as President, and Charles Hood as Cashier, in behalf of said Bank, and by Adams Bailey and others as sureties, bearing date February 14, 1837. And said lands are hereby appropriated, at said appraised value thereof, (so far as said appraisement may extend,) to the relief of said sureties, and in satisfaction (to the extent aforesaid) of the amounts for which they may be liable on said bond.

5. As the said Marshal holds promissory notes and other written promises made by or on behalf of said Warren Association, as collateral security for the protection of said sureties, which notes and promises were recently held by the said Bank, and are to be paid by said lands so far as they may be sufficient, at said appraisement; it is agreed that the said Marshal shall continue to hold the same till the completion of said levy; and that immediately after its completion, said notes and

promises, to the amount of said appraisement shall be surrendered by said Marshal to John Pickering, Esq., or either of the Trustees of said Association.

6. The Register of Deeds for the county of Suffolk, shall certify in writing that the title of the lands levied upon as aforesaid is good.

7. The sureties on the said bond and other subscribers hereto, subscribe this agreement in token of their assent to it; this agreement having been made by the request of said sureties so far as it regards said application. Neither of said sureties hereby waives any defence by admission or otherwise, which he would have had if this agreement had not been made, but will make no objection founded merely on the fact of this arrangement having been made between the Plaintiffs and said Bank.

8. The said U. States by their Attorney, and said Bank by its President, subscribe this instrument and one other of like tenor and date.

WM. FREEMAN, *President pro. tem., for Commonwealth Bank.*
CHARLES HOOD.
SAMUEL S. LEWIS.
WM. FREEMAN.
ELISHA PARKS.
F. S. CARRUTH.
OLIVER FLETCHER.
A. BAILEY.
JOHN HENSHAW.
HALL J. HOW.
OTIS RICH.
JOHN MILLS, *U. S. District Attorney.*

Note C of Document D.

Judgment of the U. S. Court, vs. the Bank.

UNITED STATES OF AMERICA.

Massachusetts District, ss.

At a District Court of the U. States, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday (being the nineteenth day) of March, in the year of our Lord one thousand eight hundred and thirty-eight. Before the Honorable John Davis, Judge.

The United States of America, Plaintiffs, versus the President, Directors and Company of the Commonwealth Bank, in the city of Boston, a corporation by the laws of the State of Massachusetts, Defendants. In a plea of the case, for that the said Commonwealth Bank, at said Boston, to wit, on the day of the date of this writ, being indebted to the said United States in the sum of four hundred thousand dollars, for so much money then before that time, by the said Commonwealth Bank, of the said United States, to their use had and received, in consideration thereof promised the said United States to pay them the said sum on demand; yet the said Commonwealth Bank, although often required, has not paid to the said United States the said sum; but hitherto altogether has and still does refuse to pay the same. To the damage of the said United States, as they say, the sum of three hundred and fifty thousand dollars.

This action was entered at the present term of this Court, when and where the Marshal returned that he attached a chip, the property of the Commonwealth Bank, and gave in hand to Charles Hood, Esq., Cashier of said Bank, a true and attested copy of the said writ, for their appearance at Court.

And now the parties appear, and upon motion of the Defendants' counsel, it is ordered that the Plaintiffs file a Bill of Particulars; whereupon the following Bill of Particulars is filed:

The Commonwealth Bank to the U. States, Dr., January 12, 1838.

Balance of deposits due to the Pension Department,	$152,684 21
Treasurer of the United States,	39,636 93
Post Office Department,	7,806 99
D. S. Townsend, Army Paymaster,	1,167 32
Collector of the Port of Boston,	65,941 77
Commissioners for building Custom House,	71,555 38
H. H. Craig, Master of Ordnance,	5 34
	$338,797 94
Interest to 11th May, 1838,	6,719 61
	$345,517 55

And afterwards the Defendants, although solemnly called to come into Court, do not appear, but make default; whereupon, by consent of parties, judgment is entered for the Plaintiffs in the sum of three hundred and twenty-five thousand, five hundred and seventeen dollars, fifty-five cents. It is therefore considered by the Court that the said United States of America recover against the said President, Directors and Company of the Commonwealth Bank, the sum of three hundred and twenty-five thousand, five hundred and seventeen dollars, fifty-five cents, damage, and costs of suit taxed at seventeen dollars and ninety-one cents.

A true copy,
Attest: FRANCIS BASSETT, *Clerk.*

Note *d* of Document D.

Collateral delivered to U. S. Marshal to secure sureties.

SCHEDULE.

Warren Association,	date	Nov.	28,	1837,	8	mo.		$25,000 00
do. do.	"	"	29,	"	10	"		25,000 00
do. do.	"	"	30,	"	12	"		25,000 00
do. do.	"	"	27,	"	7	"		25,000 00
do. do.	"	Dec.	1,	"	14	"		30,000 00
do. do.	"	"	2,	"	16	"		30,000 00
								$160,000 00
Hall J. How,	Sept. 14th, 1835, 6 mo.							11,500 00
J. & H. J. How & Co., by Hall J. How, and How & Jones, surety,	May 26th, 1834, 6 mo.							7,500 00
Memorandum check of New England Glass Company,	Dec. 24th, 1836, on demand,							30,000 00
Memorandum check of same Co.,	Feb. 23d, 1836, "							14,000 00
Promissory note, Wm. Parmenter, June 13, 1837, due Aug. 1st, 1838,								10,000 00
Promissory note of Hall J. How, Jan. 15, 1838, on demand,								33,495 00
do. " of John Henshaw, as principal, and David Henshaw and Charles Henshaw, as sureties, dated January 10, 1838, due in eight months after date,								13,531 12
								$280,026 12

Boston, Feb. 2d, 1838.

The above is a schedule of notes and demands delivered to me by Samuel S. Lewis, and David Henshaw, as security to satisfy any judgments which may be recovered in favor of the U. States, on writs now in my hands for service against the following persons, viz.: Samuel S. Lewis, John Henshaw, Elisha Parks, Francis S. Carruth, Otis Rich, Wm. Freeman, Hall J. How, Oliver Fletcher and Adams Bailey. Said United States is Plaintiff in each of said suits, and the writs in each of them bear date January 30th, 1838, and is returnable to the U. States District Court, next to be holden at said Boston, within and for the District of Massachusetts, on the third Tuesday of March next. The balance of said promissory paper, and all collections which may be made thereon, remaining after payment of such amounts as may be received as aforesaid in said suits against said several persons, any or either of them, or after a decision in their favor in said suits, shall be returned to said Samuel S. Lewis and David Henshaw, the survivor of them, their or his order.

(Signed,) JONAS L. SIBLEY, *U. S. Marshal.*

Boston, May 19, 1838.

Jonas L. Sibley, Marshal, &c.

Sir,—Please deliver to John Pickering, Esq., Trustee of the Warren Association, the above mentioned promissory notes against said Association.

(Signed,) JOHN MILLS, by
E. SMITH, Jun.

Boston, May 19, 1838.

Received of Jonas L. Sibley, Marshal, the aforementioned notes, for the Warren Association.

(Signed,) JOHN PICKERING, *Trustee.*

Marshal's Office, Boston, Sept. 14, 1838.

The memorandum checks, against the New England Glass Company, mentioned in the schedule, it was ascertained, after they came into my hands, were of no value, and they were taken back by Messrs. Henshaw and Lewis, and a judgment against said N. E. Glass Company, for $36,970 12, was assigned to me in lieu thereof. A copy of said assignments is hereunto annexed.

J. L. SIBLEY, *Marshal.*

E.

...ges of William Wright.

Boston, August 3, 1838.

SIR,—Upon the first intimation that measures were taking to compromise the demand which the United States held against the Warren Association, I addressed a letter to Mr. Everett, then at Washington, and another, I think, to Mr. Woodbury, expressing my apprehension that such compromise would end in an imposition upon government, and a reproach upon the administration. In Mr. Everett's reply I had assurances that no manner of compromise had been authorized by the Department at Washington, which led me to believe that the information which I had received was without foundation. But it soon proved otherwise, by a consummation of the plan, and the abuses apprehended have been carried into effect to the fullest extent.

It seems that the Commonwealth Bank had transferred to the United States, as collateral security, certain notes of the Warren Association, which that Association were desirous of paying in land. But as agents of government have no power to change the ordinary mode of payment by voluntary agreement, and can only take lands of delinquent debtors by legal process, a suit was resorted to —not however, against the Association, as it should have been, but against the Commonwealth Bank, as principal debtor, for which these notes were held as security; and the suit thus commenced was instituted with an apparent understanding at the time, or subsequently made between the agents of government and the Bank and the Association, that certain lands should be conveyed from the Association to the Bank, to be liable upon judgment and execution, and to be taken and set off, by appraisement, to the United States, and that the land thus to be conveyed, was to be valued by certain men agreed upon, who were to determine the quantity which should be received in consideration of these notes, amounting, principal and interest, to the sum of $164,533 33.

In pursuance of this understanding, the action against the Bank was defaulted on the 17th day of May last. Execution was then issued and levied upon the lands which had been simultaneously conveyed by the Association to the Bank for that purpose, and the former estimated value was then repeated, in order that the proceedings might appear to have the sanction of law. The notes were then given up to the Association, and the same lands conveyed by deed of the Bank, to the United States, which was executed on the 19th day of the same month.

By this extraordinary procedure, the government have acquired about 25 acres of unsaleable and almost useless lands, for which has been allowed the above sum of $164,533 33, affording a profit to the Warren Association, of something like one hundred and forty thousand dollars over its cost, although bought at the top of speculation, some three or four years ago, at a price far above its real value then or now. Its intrinsic worth at this time can hardly be more than ten thousand dollars, upon any reasonable calculation whatever.

The securities given up in consideration of these lands, so far as responsibility was concerned, were good, and might be relied upon with as much safety as though the same were against the Corporation of Boston.

It seems, by every circumstance connected with this transaction, in whatever way it is viewed that the public interests have been entirely overlooked, and official trusts prostituted for the benefit of a few unprincipled and undeserving men.

In looking at the legal steps pursued in this case, we are led to inquire why suit was not commenced directly against the Association upon its notes, when it was certain that a judgment thereon would not only subject these same lands to the operations of the law, but would subject also the personal property, and even the personal liberty of responsible men; and would subject, in like manner, the good and valuable lands of the Association, as well as the bad and worthless, if lands at all were necessary to the recovery of this debt.

The reasons for omitting this course, we are left to infer from circumstances. Probably there was fear that the government would recover too much. The anticipation of $140,000 profit on a bad bargain might have had some influence, for it was clearly seen that no necessity could exist for levying an execution against the members of this Association, upon these or any other lands; for the abundance of other means would preclude the possibility of such necessity.

In the collection of government dues, it is presumed to be the duty of agents to employ against delinquent debtors the best remedies which the laws afford. This would shut out all discretion to banter with the adverse party in manner common in private transactions. If this view is right, how could Mr. Mills, or any other agent of the government, negotiate and bargain with the Warren Association to give up their notes for $164,533 33, for an indefinite quantity of land to be conveyed to the Bank; submitting that quantity to certain men, authorized to say how much was equivalent to this debt? Why were lands conveyed to the Bank? Why not to the United States direct? What could be the difference in the end? Could this temporary possession by the Bank, holding for a time barely sufficient for the mock ceremony of a second valuation by the same men, produce a different or better result? Certainly it could not; for although these appraisers might have changed their views after the first valuation, and put down the price upon the second, yet it would be the same thing to the government, for the first valuation constituted the payment of the notes, which of course were given up, and that amount of the debt of the Bank was cancelled.

In whatever way we look at this thing, we see nothing but a departure from duty by the agents of the government to promote the interests of the adverse party. The whole proceedings from beginning show this fact. The round-about course of suing the Bank—conveying to it the lands of the Association to be levied upon and appraised—was wholly unnecessary for any other purpose.

It clearly was a device to accomplish an end upon some plausible ground of justification. But the very foundation upon which such justification was intended to be established, fails them; for the laws of the Commonwealth recognize no such procedure as an appraisement of lands taken by execution against a Bank, as in individual cases. On the contrary, they expressly provide that creditors may buy up the real estate of banking institutions and sell the same at public auction; the agents of government therefore, if bound to employ the best remedies, were bound to sell and not to appraise,—and the appraisement neither time can have any justification in law, for it was all a voluntary matter, wherein the best remedies have been entirely abandoned.

There is something unnatural in the selection of opposition men to judge in a matter wherein the United States is a party, particularly as the opposition men constitute the responsible portion of the other side. This together with the hurry—the restive and uneasy disposition to bring this matter to an end, and corroborating circumstances to show that Messrs. Mills, Sibley, or whom these agents be, had combined with the adverse party to discharge these liabilities, for the smallest consideration practicable with any hope of justification.

Whether Mr. Mills is interested in the lands of the Association, I know not; but the Marshal, Mr. Sibley, is, and is one of the trustees of the company to receive and make conveyances, and is party to the deed of conveyance of these very lands.

I have confined these remarks to circumstances connected with the management of one branch only of the affairs of the Commonwealth Bank. But there is another, equally fruitful, in view of which I may speak another day.

The effect which such conduct must unavoidably have on the administration, is a matter of serious concern, and ought not to be overlooked. Transactions like these can never be concealed and kept out of sight—and unless the executive will rid the administration of such agents, the democratic party must go down.

Already is it apprehended that the history of this transaction will be distributed through Maine upon the eve of the approaching election; if so, it cannot fail to produce an injurious effect, and may perhaps defeat that success now so strongly anticipated. Nothing is more evident than that the existence of the democratic party and the success of its principles depend entirely on the character of the national officers variously scattered over the country. Vice and immorality on the part of such officers should never be tolerated for a day—should be regarded in all cases as disqualification and cause of prompt removal. But this branch of executive duty seems to be entirely neglected, so far at least as applies to this quarter of the country. As evidence of this fact, we see among us individuals continuing to enjoy the executive favor, whose principles and morals are of the most questionable kind. And as to some of them, they are implicated in offences which are *criminal;* and punishable by confinement at hard labor in the state penitentiary.

These things the President is supposed to know, for repeated statements and complaints have been made to him; still he tolerates this disgrace upon his administration, rather than apply the proper corrective, which no one else can do.

By this indulgence, the party suffers, the administration suffers, and will continue to suffer to the end of this strange and unaccountable forbearance.

If the President misconceives the true state of things here, and sees not the necessity of purging the ranks of the office-holders in this city, in preservation of his own official character, if nothing more, it shows a want of faith in the credibility of friends who have endeavored to serve both him and the cause by faithfully representing the truth. But it is always in his power to ascertain facts by investigation: this would test the veracity of complainants as well as the conduct of those complained against. But even this has never been attended to on the part of the Executive.

Some of these remarks perhaps would be more appropriately addressed to the President than you. But they are naturally associated with the main object of this communication, which is more appropriately addressed to you as the officer of government from whom the immediate agents in this transaction are supposed to have received their instructions. How far these agents may be able to entrench themselves behind such instructions, I know not. It is probable, however, if any authority has been given, it is rather a *permission* than instruction, given under a misapprehension of the case, and elicited perhaps for a corrupt end, by incorrect and improper statements. Such a course is in perfect keeping with the characters of certain persons here, who have controled the local interests of the government in this quarter for years.

Knowing all these things, I cannot believe in any foreign agency, in the planning of this stupendous cheat. It is earnestly hoped, therefore, for the cause of justice, that prompt and decided measures will be taken to exonerate others from imputation by a discharge from the government employ, those who are the real authors of it.

With much respect, your obedient servant,
WILLIAM WRIGHT.

To Hon. H. D. Gilpin,
Solicitor of the Treasury.

F.

William Wright to Mr. Gilpin.

Boston, August 15, 1838.

Sir,—I have received your letter of the 10th instant. To answer the enquiry you make, whether my communication of the 3d was intended as official, I have to say it was. *As to the remarks con-*

cerning the President, I have only to say that I regret exceedingly that there should be any occasion for them. My views in future upon the same subject will be addressed to the President himself.

I am glad to hear that you intend to go into a thorough investigation of this affair of the land. But I do not understand, whether it has reference to the dismissal of agents for improper conduct, or whether only to redress the wrongs done the United States. Perhaps it is both. But in pursuing your intention, it is necessary that you guard against committing this labor to wrong hands, who will strive to whitewash the matter, rather than investigate it.

Respectfully, your obedient servant,
WILLIAM WRIGHT.

HON. H. D. GILPIN,
Solicitor of the Treasury.

G, page 11 & 21.

Reply of Mr. Mills to the charges of William Wright.

United States' District Attorney's Office, Boston, Sept. 15, 1838.

SIR,—Your letter of the 25th August, enclosing an extract of a letter from Mr. William Wright, was received some days since. The letter from Mr. Wright, as you justly observe, censures so strongly the officer of the United States, as to call for a full explanation and reply to its allegations.

Mr. Wright commences his letter by stating that the notes of the Warren Association were transferred to the United States by the Bank. In this he is incorrect; the notes were never transferred to the United States.

He complains that a suit was brought against the Bank and not against the Association, as it ought to have been. It may possibly be a satisfactory answer to this objection, that the United States had no claim against the Association, and that the notes referred to were not payable for several months.

The men selected as appraisers, says Mr. Wright, were to determine the quantity of land to be conveyed by the Association to the Bank in consideration of these notes, and were then to go through the "mock ceremony of a second valuation." This is stated as a fact, not an inference. In another part of his letter, he says "the first valuation constituted the payment of the notes;" coupling that declaration with another, equally erroneous, that the notes were then given up. It is to be regretted that any man in this community should make a charge of this kind, injurious to the character of the agent of the United States, if not of the appraisers, and which is destitute of the least particle of truth.

Had Mr. Wright been as anxious to obtain correct information on this subject as he was to communicate his own conjectures, inferences and suspicions to the Department, he could have learnt from the appraisers that they made but *one* appraisal of the lands; that they knew nothing of the valuation made at the time of the conveyance; and that that valuation therefore could not have influenced their judgment. I could have assured Mr. Wright, that I knew nothing of the valuation he refers to, and that the notes were not given up till the completion of the levy.

The next specification in Mr. Wright's letter is that the securities given up were good, and might be relied on with as much safety as though the same were against the corporation of Boston. If this allegation is true, and it were known to me that these securities were of the value he has stated, or if the evidence of that could have been obtained by the exercise of due diligence, I agree that so far as respects myself, his censure is justly merited. And upon this point I do not wish to rely upon the strong comparison he has made, but will suppose he only intended to say that the securities were good, and that they would at that time have passed in the money-market, in this city, with the endorsement of the Commonwealth Bank, for as much value as the notes of any well-known responsible individual, with the same endorsement and running the same time. Mr. Wright states no facts in support of his declaration, and I shall presume that he has no particular information on this subject more than is known to others. When the Commonwealth Bank failed, the Warren Association was owing that institution a sum not varying much from $250,000, and for which the Bank had no security except notes signed by the Treasurer of the Association. I feel confident that the brokers and business men in this city will sustain me in the assertion that the anticipated loss upon this large debt had more effect in depressing the bills of the Bank than all other causes combined. Will Mr. Wright, or any intelligent man, pretend that anything occurred, between the failure of the Bank and the 17th of May, that enhanced the value of those notes? The truth is the reverse of this. At the time the legislative committee made their investigation, I was of opinion that the associates were personally responsible for the notes. But facts were soon after disclosed, or came to my knowledge, that very much diminished my confidence in that opinion. As a general principle, all the members of a joint stock association are personally responsible for the debts of the company. But in this case I was well satified, on examination, that the officers of the Association were prohibited from borrowing money, or incurring debts beyond the sum of thirty thousand dollars. Such restriction, it is not supposed, would avail to defeat the claim of a creditor who had no notice of it. But all these notes were taken by the Commonwealth Bank with full notice that the Treasurer of the Association had no authority to contract the debt. I do not pretend that a recovery against the associates was entirely hopeless, but I do say that it was so very doubtful that no prudent man, standing in the same relation, would have sought his remedy by a law-suit if he could receive his debt in lands at an appraisal. Aside from this, there were many urgent

considerations in favor of an arrangement by which that large claim should be cancelled. These notes it will be recollected were all on time, and some of them had more than a year to run: the United States not holding them could not sue them when due, nor could they reach them by a trustee process, as they were negotiable paper. I had strong fears also that other creditors of the Bank would enter into this arrangement, which they could do by indemnifying the sureties to the amount of these notes, or by the creditors and Association assuming the risk of a recovery against the sureties. It may be said if this were done that it would of course diminish the debts of the Bank and leave the balance of the assets for the other creditors. The answer to this is that the Bank is insolvent probably to the amount of one hundred and fifty thousand dollars. If, therefore, the United States should fail in the actions against the sureties on the bond of February 14, 1837, and the notes of the Association or the avails of these notes should have passed into the hands of other creditors of the Bank, the United States would, unquestionably, lose some considerable portion of their debt. I was from the first very anxious to get possession for the United States of as many securities from the Bank as possible. It was with difficulty I prevailed upon the officers of the Bank to transfer the notes of Henshaw and others to secure the claim standing to the credit of the Treasurer of the United States, and which first came into my hands for collection. But the only way in which I could obtain an absolute lien upon the notes of the Warren Association was by the agreement entered into on the 11th of May. By effecting this arrangement, these securities or their proceeds have been applied upon the debt of the Bank. These were the principal reasons that led me to recommend the course adopted. The matter was of considerable importance; it was not hastily or inconsiderately decided, but received a careful and repeated examination. I was aware, at the time I gave this opinion, of the state of feeling in regard to the Bank and Association, and had a presentiment that my conduct would be censured, though it now comes from a quarter not then anticipated. But being satisfied that under all the circumstances of the case the arrangement would be beneficial to the United States, and that the proceedings to carry it into effect were legal, I had no hesitation in advising its adoption.

In collecting the government dues, says Mr. Wright, it is presumed to be the duty of agents to employ against delinquent debtors the best remedy which the laws afford. This principle is unquestionably correct, and it is one upon which I profess to have acted. "This would shut out all discretion to banter with the adverse party in manner common in private transactions." If by this, Mr. Wright means that the Attorney of the United States has nothing more to do than to commence an action and give his attention to it in Court, and can make no arrangement common in private transactions, to render the judgment productive, his views, in regard to the extent of my official duties, are very different from my own. I am yet to learn that a different rule is prescribed in a case in which the United States are parties, than would be were an individual my client. In either case, if the interest of the principal required that an arrangement should be made "with the adverse party," even to place property in a condition that it could be legally attached or levied upon by execution, it would in my opinion be the duty of the Attorney to make the arrangement. Had I acted upon the principle that I was shut out from the exercise of "all discretion in manner common in private transactions," I should have been spared much labor and anxiety in this business, and should probably have escaped the censure of Mr. Wright, and reprehension from any other quarter.

Mr. Wright next inquires why were lands conveyed to the Bank? Why not to the United States direct? The reason is that the United States had no claim against the Association, and if they had, there was no authority for taking a conveyance. They had an execution against the Bank, and the law authorized the levy of it upon the lands of the Bank.

On this point Mr. Wright alleges that the laws of this District recognize no such procedure as an appraisement of lands taken by execution against a Bank.

By the general law in this District, on taking lands to satisfy executions for debt, "all the real estate of a debtor may be taken in execution for his debt." By another act, many years subsequent to this, it was enacted "that the lands of any Bank may be taken in execution and sold by public auction." This act does not in terms repeal the other, and it cannot be supposed that it was the intention of the Legislature to repeal it by implication. On this point I had no doubt; but as Mr. Wright's statement was apparently drawn up by a lawyer, and he confidently asserts that the appraisement was illegal, I submitted the question to several gentlemen of the profession; they were all of opinion that the first statute is in full force, and that the lands of a Bank may be levied upon or sold at the option of the creditor. Should it be inquired why the lands were not sold on the execution, the answer is obvious: the Association would not consent to make the conveyance, nor the Bank to receive it, on those terms. It is well known that when "the money market is tight," there is scarce any kind of property on which the loss is so great by a forced sale, as lands, especially where the quantity sold is large. So far as regards the Association, the lands could not have been sold on execution, but must have been set off by appraisement, had the execution been against the Association, instead of the Bank. But it may be contended that if the arrangement was judicious as between the Bank and the Association, it was not for the interest of the U. States. This I think can be easily tested by supposing there was no law authorizing the sale on execution; that the lands previously belonged to the Bank, and had been attached on the original writ in favor of the United States; could any one acquainted with the circumstances, doubt for a moment, as to the propriety of extending this execution upon the lands? And if, in the case supposed, no doubt could arise, then how can the agent be censured for proposing an arrangement by which the lands were to be placed in a condition that they might be disposed of in the same manner?

The reasons for omitting to sue the Association on the notes, Mr. Wright says may be inferred

from circumstances; and after making the charitable inference that there was fear the United States would recover too much, he proceeds to say that it was clearly foreseen no necessity could exist for levying an execution against the members of this Association upon these or any other lands. It is readily admitted that an execution to the amount of these notes, against the reputed members of this Association, might be collected without resorting to real estate. But an *execution* against the members of that Association would be considered rather more valuable than notes of hand on time, signed by the Treasurer of the Association, the validity of which were contested by the associates on the ground that the Treasurer had no authority to borrow the money, and that this was well known to the officers of the Bank when they made the loans. So that though it might be "clearly foreseen" that an execution (if obtained) against certain individuals would be available in money, yet Mr. Wright is, I believe, the only one whose vision was so clear as *not to see* that there were serious if not insurmountable obstacles to encounter before a judgment could be obtained against the associates.

Mr. Wright next complains that there is something unnatural in selecting opposition men to make the appraisal. It is true that the appraisers are Whigs, and I intended to appoint such. In an ordinary transaction of this kind, I should pay no regard to the political character of the men; but I did in this case, and I will assign my reasons for doing so. The Commonwealth Bank, for many years, and at the time of its failure, was under the management of men friendly to the administration. The Warren Association I have always supposed was a kindred institution. Mr. Hood, the Cashier and one of the Directors of the Bank, was Treasurer of the Association, and one of its Trustees. Mr. How was President of the Association, a Director, and he was also a managing Director of the Bank. But nothing shows more clearly the intimacy of the two institutions, than the fact that when the Bank failed, the Association was its debtor for more than $200,000, for which they had no security. Under these circumstances, let me suppose I had appointed men of a different political character than Messrs. Merrill, Gurney and Binney, and that they had appraised the lands at the same value, or for more or less, would no complaint have been made? I should have met with no difficulty in selecting competent appraisers from my political friends; but they would, in all probability, have been the acquaintance of some one or more individuals deeply interested in the Bank or Association. If this course had been adopted, I am inclined to think it would not have been more satisfactory to Mr. Wright; but if, in the case supposed, he were silent, some one might possibly be found in the ranks of the opposition, who would have no stronger confidence in the honesty of Democratic appraisers than he has in the Whig gentlemen I selected.

I may, indeed, consider it fortunate that I appointed men to the performance of this duty whose character will effectually shield them from any imputation of dishonesty that Mr. Wright may cast upon them. And if the appraisers escape unscathed, the "overt act" could not have been committed by the agents; for however anxious they may have been to perpetrate the fraud, it could be consummated only by the intervention and perjury of the appraisers.

Mr. Wright informs you that the action against the Bank was defaulted on the 17th of May; that execution was issued and levied upon the lands which had been simultaneously conveyed by the Association to the Bank for that purpose. These he considers "corroborating circumstances to show that Messrs. Mills and Sibley combined with the adverse party to discharge these liabilities for the smallest consideration practicable with any hope of justification." But how long an interval between these several acts would Mr. Wright require, to prevent the inference of fraud? Will he say the lands would not in all probability have been attached by other creditors of the Bank, as soon as it was known that the conveyance was made? If we had paused in this business for a week, or a day, in order that Mr. Wright should not have it in his power to say that we were eager to defraud the government, and in this interval the lands had been lost by another attachment, is it to be supposed that he would have been satisfied? Or does he claim the privilege of complaint whether our progress is slow or fast? I am sorry that Mr. Wright's moral sense is so obtuse that he cannot correctly appreciate the motives that influenced the agents in transacting this business; and he perceives no evidence of a desire on their part to guard and protect the interests of the United States, but a restless disposition to defraud them of one hundred and forty thousand dollars.

Mr. Wright does not know, he says, whether I am a member of the Warren Association. I have good reason to believe that he does know that I am not and never was a member.

Mr. Wright refers to a deed of these lands, from the Bank to the United States, executed the day after the levy. When Mr. Adan returned the agreement executed by the officers of the Bank, and the sureties, I said to him, that the title to lands set off on execution was often defeated by some informality on the part of the appraisers, or of the officer in making his return; and to guard against such an occurrence, I should request him to obtain a deed of confirmation from the Bank to the United States. I left the city on the morning after the levy was completed. The deed was put on record in my absence. I never saw it, and my conversation with Mr. Adan escaped my recollection till I read Mr. Wright's letter. I make this statement as an apology for not forwarding you the deed or a copy of it with my report.

In your letter enclosing Mr. Wright's, you express regret that the agreement of the 11th of May, 1838, was finally concluded without being submitted to your office. That agreement, in the view I take of it, is not materially different from the proposition previously submitted. It differs materially from Mr. Adan's; but every essential alteration was supposed to be favorable to the U. States, and that is the reason I did not think it necessary to submit it to your revision. Mr. Adan's proposition was, to take judgment for about $200,000. I insisted, and it was so agreed, that judgment should be rendered for the full amount due from the Bank. And I will here observe, that one con-

sideration which led me to propose this arrangement was, that by getting judgment against the Bank, the plaintiffs would be immediately (or as soon as return could be made on the execution,) in a condition to commence proceedings in chancery. If the arrangement had not been made, the defendants, in all probability, would have carried the case into the Circuit Court, and judgment would have been delayed till May next.

Another of Mr. Adan's propositions was, that the lands attached should be levied upon as well as those proposed to be conveyed to the Bank. This was rejected. It was further proposed, as stated in Mr. Adan's letter, that "the quantity of land to be conveyed by said Association to pay said one hundred and sixty thousand dollars, to be determined by the same three appraisers who shall under oath appraise the same in said levy. This I objected to as improper, and it was omitted in the agreement.

The sureties were not considered necessary parties to the agreement and they subscribed it to prevent any question being made that their rights were injuriously affected. It appears to me that it was immaterial to the sureties whether the application of the amount of the notes was made before or after their liability was ascertained. If they are held for all sums deposited by the United States in the Bank, they will receive the benefit of these notes; and if they are discharged, the previous application can in no way be prejudicial to them.

In making and carrying this agreement into effect, I certainly did suppose that I was acting with your approbation. If, after the full statement I have now made, you should be of opinion that I have pursued a course at variance with the spirit if not terms of your letters of the 6th of March, 9th of April, and 4th of May, I shall, in my own justification, wish to give the reasons why I supposed I was acting with your sanction, and to request that the papers may be placed on the files of your office.

By referring me, in your letter of the 9th of April, to the 8th and 9th sections of the act of 20th April, 1818, I did not consider it as a direction to institute a garnishee process against the Warren Association, under that statute, but that it was left to my discretion to do it, if, under the circumstances, such process could be sustained. The notes given by the Treasurer of the Association were negotiable, and they had been actually transferred by endorsement. It appeared to me that the process could not be sustained. In regard to the chancery process, could I have filed a bill sooner than I did? Is it not a general rule that there must be a recovery against the debtor and a return of *Nulla Bona* on the execution before you can proceed in chancery? I had supposed that the complainant is in all cases bound to show that he sued out execution and pursued it to every possible extent before he files his bill.

In this case, immediately on the return of the execution, I filed a bill against the Bank, making several of its debtors parties to it.

At the time the writs were served on the sureties to the bond of the 14th February, 1837, it was supposed that the security then taken by the Marshal was the best that could be obtained. I may be mistaken, but I am still of that opinion. Had the notes of the Association gone back to the Bank, they would form a valuable part of its assets; but it is doubtful into whose hands those assets would have fallen. The United States might, to that amount, have changed positions with some creditors of the Bank who will now get nothing.

You do me the justice to say that you doubt not the course I adopted, in relation to the notes of the Warren Association was, in my opinion, best for the interests of the United States. I think I am able to show that I have used reasonable care and professional skill in managing the business with which I have been entrusted.

I am, sir, very respectfully, your obedient servant,

JOHN MILLS,
District Attorney.

To the Solicitor of the Treasury.

H.

Mr. Choate's opinion upon the settlement.

Boston, November 22, 1838.

Sir,—I should have answered your letter before, but some of the inquiries which it made necessary were of a kind so little professional, and obliged me to collect the judgments of so many different persons on matters with which I was not very familiar, that I have but just prepared myself to communicate any opinion upon the several questions stated by you. I have not felt myself at liberty to avail myself of any considerable assistance from Mr. Mills, and this circumstance, also, has increased the difficulty in the way of an early reply.

The result to which I have arrived is, that the arrangement effected by Mr. Mills, was, under the embarrassing circumstances of the case, a judicious arrangement for the government, entered into in the purest official good faith, in the exercise of a sound discretion. I consider the question, in the first place, whether the Commonwealth Bank could enforce the notes signed by the Treasurer of the Warren Association, as attended with great difficulty. The highest professional opinions were divided upon it. The agents of the Association, who executed and delivered the notes to the Bank, exceeded their authority in that act, and the agents of the Bank, who received the notes and made the advances on them, were perfectly conusant of this excess of authority of the agents of the Association. They were so, because they were themselves officers in the Association and in the Bank.

The stockholders in the Association had determined to contest their liability, and would have

been charged, if at all, at the end of a very long and expensive litigation. The sureties of the Commonwealth Bank, who received these notes from the Bank, stood upon no higher equity than the party from whom they received them, and would have had the same difficulty precisely in enforcing them against the Association.

But whatever may have been the chances of recovering on these notes in the hands of the Bank, or its sureties, the United States could do nothing with them, until they should first recover a judgment against the sureties. The Marshal held the notes only as a collateral security by special deposit, for such contingent judgment. Whether such will ever be recovered, and to what extent it will ever be recovered, are great questions, now actually under litigation in the District Court. I am about putting in replications to the pleas of the sureties, and I should not wish to express any opinion as to the result, but I will venture to say that the District Attorney conducted with much discretion in procuring for the government an absolute title to land, in lieu of notes which were to be wholly unavailing until judgment should be recovered against the sureties, and then only to the extent of such judgment.

With regard to the details of the manner in which the title was passed to the United States, it would, of course, have been preferable (if it had been practicable) to have seized and sold the land, and applied the actual net proceeds only to the execution. But this was impracticable. Against the Warren Association the United States had no judgment, and never could have any, until after it should recover one against the sureties of the Commonwealth Bank. It was part of that arrangement, that the land, when conveyed to the Bank, should be taken under an appraisement, and the United States could get it in no other way. The question resolves itself into this: Was it expedient to accept the land at all? For if it were, (as I think it was,) it could only be had as it was had. The proceedings upon the levy were legal, and the title of the United States was perfect, that is to say, it has the entire title of the Association. I take it for granted that title was good, but have not investigated it.

Upon a levy of execution against a corporation, I think the judgment creditor has an option to sell, or to take under the valuation. In this instance, as I have stated, the judgment creditor could proceed but in one way.

I do not well see how more, or more judicious pains could have been taken in the selection of appraisers, and I do not see any shadow of hope that the appraisement could be vacated for fraud or irregularity.

The District Attorney really selected two out of three. The men were unexceptionable, and all suspicion of fraud, or undue influence, is excluded by the circumstances.

There is, indeed, a universal, unconscious and irresistible inclination in jurors and appraisers in favor of a party litigating with the United States, and it is not impossible that this may have affected the appraisement in this case, but I see no ground for setting aside the proceedings.

My inquiries as to the justness of the valuation have not been entirely satisfactory.

Certainly, in the present state of the money market, and of the public temper in relation to matters of speculation, the appraisement is high. The government must hold the land a long time, I think, before it can realize the amount of the appraisement.

I am free to say, however, that I think it may, ultimately, become productive and valuable.

Very respectfully, yours,

(Signed,) RUFUS CHOATE.

To H. D. GILPIN, ESQ.,
Solicitor of the Treasury of the United States.

I.

Mr. Gilpin's report to Congress.

Treasury Department, January 26, 1839.

SIR,—In compliance with the following resolution, adopted by the House of Representatives on the 14th instant, viz.:

"*Resolved*, That the Secretary of the Treasury be directed to inform this House what is the present amount of indebtedness to the United States (if any) of the Commonwealth, Franklin, and Lafayette Banks, severally and respectively, in the city of Boston, in the State of Massachusetts; and in what manner, and to what extent, the debt due from each of said Banks is secured; and if the debts of said Banks, heretofore reported to Congress, have been paid, at what time and in what manner the payments were made; and whether the debt, heretofore reported to be due from John K. Simpson, late Pension Agent in the city of Boston, has been paid or secured to the United States; and if paid, how, or when; or if secured to be paid, by what suretyship of persons or assurance of property; and what measures have been taken, on behalf of the United States, to obtain security, or payment of any amount which may be due from said Commonwealth, Franklin, and Lafayette Banks, and the estate and sureties of the said John K. Simpson, respectively,"—

I have the honor to submit the annexed report from the Solicitor of the Treasury. It is believed to contain all the information desired, except the additional remark may be proper that the Lafayette Bank has never been a deposit Bank, nor is it known ever to have been in any way indebted to the United States.

Respectfully,
LEVI WOODBURY,
Secretary of the Treasury.

HON. JAMES K. POLK,
Speaker of the House of Representatives.

Office of the Solicitor of the Treasury, January 25, 1839.

SIR,—I had the honor to receive the resolution of the House of Representatives of the 14th instant, referred by you to this office, and requesting information as to the legal proceedings instituted for the recovery of the debts due to the United States from the Commonwealth, Franklin, and Lafayette Banks, at Boston; and from John K. Simpson, late Pension Agent at that place.

On the 18th January, 1838, an account was transmitted to this office by the First Comptroller of the Treasury, stating that there was "a balance of public money remaining deposited in the Commonwealth Bank, on the 8th January, 1838, and due to the United States, of $51,749 90." This account was transmitted immediately to the District Attorney at Boston, with instructions to commence suit for the recovery of the balance stated against the Bank and its sureties in the bond dated 14th February, 1837, and taken under the provisions of the deposit act of 23d June, 1836; the penalty of which was for $500,000, and of which a certified copy was transmitted. This was accordingly done. As it appeared that the bond had never been duly executed by the Bank, under its corporate seal, and as the sureties also contended that an action could not be sustained against them, because the balance of public money now stated to be due, and sought to be recovered, had all been deposited *since* the Bank ceased to be a deposit bank under the provisions of the above law, the District Attorney deemed it advisable, in addition to the above, to institute a separate action of assumpsit against the Bank itself. He did so, accordingly, on the 22d of January, and he obtained from the Bank, notes of its debtors, considered by him adequate collateral security for the payment of the whole stated balance.

On the 24th January, the Secretary of the Treasury informed this office that, in addition to the balance reported on the 18th as due, there were considerable sums of public money placed there by collecting and disbursing officers, and still remaining on deposit in the Bank, which were included among its liabilities to the United States, and for which the sureties in the official bond were considered by the Treasury Department to be liable, as well as the officers, personally, who made the deposits. Instructions were immediately given to the District Attorney to this effect. On examining the books of the Bank, he ascertained the following balances of deposits by collecting and disbursing officers:

Pension Department,	$152,684 21
Post Office Department,	7,806 99
D. S. Townsend, Paymaster,	1,167 32
David Henshaw, Collector,	65,941 77
H. K. Craig, Master of Ordnance,	5 34
Shaw, Lewis and How, Commissioners new Custom-House,	71,555 38
Making, together,	$299,161 01
Adding to this the above-stated balance, due to the Treasurer of the United States, of	51,749 90
Would make an aggregate of	350,910 91
The Treasurer's balance, however, was reduced, before suit was instituted, by a payment of	12,112 97
Leaving the aggregate of public money on deposit,	$338,797 94

On the 30th January, separate suits were accordingly commenced by the District Attorney for the recovery of this sum, against Hall J. How, Otis Rich, John Henshaw, Elisha Parks, F. S. Carruth, William Freeman, Oliver Fletcher, and Adams Bailey, the sureties of the Bank in its bond of 14th February, 1837; the damages in each case being stated at $400,000, and the Marshal being directed to attach sufficient property.

Suits were also commenced against Hall J. How and Charles Hood, the sureties of John K. Simpson in his bond of 30th January, 1834; and against Otis Rich and John Henshaw, sureties of Simpson in his bond of 12th February, 1836, to recover from them the portion of the above amount which was due under his pension agency; and at the same time the proper steps were taken to secure the priority of the United States in the distribution of the assets of his estate, he having died insolvent.

On the process being served by the Marshal, on the 2d February, against the sureties of the Bank, they placed in his hands securities to the nominal amount of $280,000. These consisted of promissory notes due to the Bank by its debtors, which had been transferred to the sureties previous to the institution of the suits, and formed the most valuable, if not the only available portion of the property of the Bank at the time of its failure. They were placed in the Marshal's hands conditionally, to abide the result of the suits against the sureties on the bond. These sureties, however, contested and totally denied their liability to the United States under this bond, on the grounds, as was understood, that the bond was never duly executed, not having been sealed with the seal of the Bank; that, by the terms of the bond and of the contract made with the Bank by the Secretary of the Treasury, pursuant to the provisions of the deposit act of 1836, the sureties were only bound for the security of the public moneys belonging to the United States, deposited to the credit of the Treasurer, and not for deposits made by disbursing officers in their own names, of which nearly the whole of what they were now sued for consisted; that, even of these deposits, the principal

portion had been made since the Bank ceased to be legally a deposit Bank, and therefore at a period when the legal liability of the sureties, had it previously existed, was at an end; and that, so far as regarded the small sum which did remain to the credit of the Treasurer, the whole of that had been received by the Bank subsequent to that event. On these grounds principally, and upon some others, the sureties have resisted the claim of the United States against them; and the suits are now pending in the District Court of the United States at Boston.

Among the two hundred and eighty thousand dollars of securities, above referred to as handed over conditionally by the sureties to the Marshal, to await the event of these suits, were six promissory notes signed by Charles Hood, as Treasurer, on behalf of the Warren Association, amounting, altogether, to $160,000, and payable in four, five, seven, nine, eleven, and thirteen months. The Directors and associates of the Warren Association, however, denied their liability for these notes, on the ground that they were signed by the above-named officer in violation of an existing and positive prohibition, which expressly forbid any officer to borrow money, or incur debts beyond the amount of $30,000, without a resolution to that effect; and that the existence of this prohibition was known to the Commonwealth Bank at the time the loan was made upon these notes. The residue of the notes conditionally handed to the Marshal, and amounting to somewhat more than one hundred thousand dollars, were considered, in general, to be good. As several of the sureties, who were parties to the bond, had failed, and as real estate (except about $10,000) was the only property of the solvent sureties that could be attached, the District Attorney considered this transfer, conditional as it was, of these promissory notes, to be for the interest of the United States, as it unquestionably was. The sureties, however, refused to surrender them, or allow the Marshal to hold them to respond to any judgment against the Bank itself, but such only as might be recovered on the suits instituted against themselves, and in which they contested their liability.

On the 9th February, 1838, a duly certified copy of the contract entered into by the Bank on the 15th July, 1836, and which, being duly executed, was not liable to the objection taken to the bond, was transmitted to the District Attorney, with copies of the several bonds, to be used in further proceedings against the Bank, should he deem it advisable. On receiving the contract, the District Attorney commenced suit upon it against the Bank, and under it the sheriff attached all the lands belonging to the Bank that he could find. They were not of much value, but the District Attorney is of opinion that at least $20,000 of the debt due to the United States will be realized out of this suit.

On the 17th May, 1838, during the March term of the District Court of the United States, and pursuant to an agreement made the 11th May, a judgment was confessed by the Bank, in the action of assumpsit, and duly entered of record in favor of the United States, for $325,517 55. The whole debt at that time amounted to $345,517 55, but the balance of $20,000 being considered by the District Attorney as secure under the suit brought on the 23d February, judgment for it was left to await the termination of that action. On this judgment for $325,517 55 execution was issued to the Marshal on the same day.

At the time that the Bank thus agreed to confess this judgment for the whole amount of the public moneys on deposit, there was no property, real or personal, belonging to that institution, and known to the District Attorney or the Marshal, which could be levied upon; the sureties, and the sums that might be ultimately realized out of the promissory notes and securities held conditionally by the latter officer, constituted the only source from which payment was to be expected. A proposition, however, had been made by the Bank and the sureties, for the unconditional substitution of real estate for that portion of the conditional securities which consisted of the notes of the Warren Association, provided the United States would proceed under its execution by way of extent of the real estate, and not by a Marshal's sale. The law of Massachusetts gives an option, as to either of these modes, to a judgment creditor against a Bank or corporation, while against private debtors it obliges him to take the real estate by extent, at a valuation and appraisement made according to law; and it was contended by the Directors and associates of the Warren Association, that even if they could be held personally answerable for these notes, (which was denied, and would be contested if suit was brought on them,) yet, in case of eventual recovery, their real estate must be taken by an extent similar to that which they required the United States to adopt, in case it should be voluntarily conveyed to the Commonwealth Bank, and made liable to its debts. It was agreed, on the part of the United States, to pursue this mode under its execution, provided the Warren Association would convey absolutely to the Commonwealth Bank, and thus render liable to the execution, an amount of real estate sufficient to cover the whole principal and interest of its notes held conditionally by the Marshal; that the Register of Deeds should certify, in writing, that the title of the lands so conveyed was good; and that two of the three appraisers required by law should be named by the District Attorney.

Under the execution in the hands of the Marshal, therefore, Nathan Gurney and James C. Merrill were appointed appraisers on the part of the United States, and Amos Binney on the part of the Bank —all considered to be persons well qualified to make the appraisement and valuation. Real estate, to the amount of $166,137 90, consisting of sundry squares and lots in South Boston, and estimated, it is understood, at the value of fifteen cents a foot, was extended and delivered to the United States, under this process. To confirm the title of the United States more effectually, if necessary, a deed was also executed by the Bank on the 18th of May, 1838.

On the 31st of July, 1838, the District Attorney collected out of the securities placed in his hands by the Bank in January preceding, a further sum of $2,595 68, together with the costs that had accrued. This was paid by him to the Marshal, and by that officer paid into the Treasury.

On the 31st July, the District Attorney filed a bill in equity against sundry debtors of the Bank,

with a view to obtain such further security from that source as might be available towards the debt due to the United States.

On the 9th November, 1838, the District Attorney collected from the securities above referred to a further sum of $16,255 71, together with costs. This was paid over to the Treasurer of the United States, and duly covered by warrant on the 22d November, 1838.

It will thus be seen that of the original amount due from the Bank to the United States, of		$350,910 91
Payments have been made into the Treasury to the amount of . . .	$30,964 36	
And real estate has been set off, by extent, to an amount of	166,437 90	
		197,402 26
Thus leaving due, exclusive of interest, ...		$153,508 65

It may be proper here to remark, that representations having been made to the Secretary of the Treasury, and to this office, unfavorable to the course pursued by the District Attorney, as stated above, in entering up the judgment and proceeding under the execution by an extent of the real estate conveyed by the Warren Association, the same were fully examined by this office, not only in regard to their correctness in a legal point of view, but to their expediency and tendency to promote the interests and best secure the debt of the United States. The principal grounds on which these allegations rest, are, that the United States should have proceeded against and could have recovered from the individual members of the Warren Association the amount of their notes; that the real estate should have been sold, and not extended, under the execution; that the appraisement under the execution was unfair, if not fraudulent; and that the agreement made by the District Attorney was an improper compromise of the rights and interests of the United States. It will be perceived, from the previous part of this report, that these allegations are founded on error as to facts. At no time has it been in the power of the United States to proceed against or recover from the individual members of the Warren Association the amount of their notes. These notes were negotiable by endorsement, and were transferred by the Commonwealth Bank, which held them, to the sureties, previous to the institution of the suit against them. They were handed to the Marshal, on the express condition that they were to be held by him responsible only for such judgment as might be recovered by the United States against the *sureties*. Until, therefore, there was a judgment against them on their bond, the right of the United States to which is totally denied on the grounds before stated, no proceedings could be instituted on the notes of the Warren Association. But, further, if the sureties were held liable, the individual members of the Warren Association denied their liability on the notes, for the reason, also before stated, of their illegal execution by unauthorized officers. Had these defences failed, and judgments been ultimately recovered on the notes, the defendants would, under the laws of Massachusetts, be entitled to have their real property extended in the very mode for assenting to which the District Attorney is complained of, unless sufficient personal property could have been found. The real estate was extended, instead of being sold, because in no other manner could it have been made available to the United States. It was not the property of the Commonwealth Bank. It never would have been conveyed to them, so as to be liable to execution, except under the agreement to adopt this one of the two modes allowed by law. To have done otherwise would have been to grant to the plaintiff better terms than he could have gained, had he succeeded in a very doubtful and complicated legal controversy. There is no reason to believe that the conduct of the appraisers was unfair or fraudulent. They are men stated to be of high character and standing; well acquainted with the value of such property; totally unconnected with any of the parties; their selection was made without their previous knowledge; and their estimate was unanimously adopted, without previous concert. Whether the value set upon the land be too high, is a point which can only be decided by ultimate sales. While, on one hand, statements have been made to this office to that effect, on the other there have been numerous representations of a contrary character, with confident assurances that the result will be ultimately a complete indemnity to the United States. Reviewing all the facts of the case, as they have come to my knowledge after full inquiry, and considering the very doubtful litigation in which the United States would have been involved, not merely with the sureties, but with the members of the Warren Association, no hesitation existed, or does exist, on my part, in expressing approbation of the course taken, as that which, under the circumstances, was proper, in a legal point of view, and decidedly best for the interests and ultimate security of the United States.

Taking into view, however, the nature of the allegations, and the advantage to be derived from the opinion of counsel fully acquainted with the local laws and mode of proceeding; considering, too, the large amount that still remained unsecured, as well as the intricate questions involved in the pending suit on the bond of the sureties; the professional services of Rufus Choate, Esq., were, with the approbation of the Secretary of the Treasury, retained in aid of the District Attorney; and he was requested to investigate and report fully, to this office, on the legality and expediency of the whole previous proceedings. In the reply of Mr. Choate, he expresses his decided opinion that the course pursued by the District Attorney was judicious for the government, and entered into in the purest official good faith, in the exercise of a sound discretion; that the liability of the stockholders for the notes of the Warren Association, as well as that of the sureties under the official bond held by the United States, were questions attended with great difficulty; and that the District Attorney displayed much discretion in procuring for the government an absolute title to land, in lieu of notes,

which were to be entirely unavailing until judgment should be recovered against the sureties, and only to the extent of such judgment. He also confirms, entirely, the legality and professional as well as official correctness of the proceedings upon the levy.

In regard to the balance due, under the judgment, of $153,508 65, exclusive of interest, it will be seen that the United States have to look to the recovery against the sureties on the bond of 14th February, 1837, so as to render available the residue of the notes handed, conditionally, to the Marshal, and which amount to something exceeding $100,000; to the proceeds of the attachment and judgment in the suit brought in February, 1838, on the contract of the Bank; to a recovery on the two official bonds of John K. Simpson, for the amount of the pension deposit, and to such sums as may be recovered out of the assets of Simpson's estate, or under the chancery proceedings instituted against the debtors of the Commonwealth Bank. In all these, legal proceedings are still pending. The foregoing statement affords as full a view as can be given of the grounds on which ultimate success is to be expected. The amount of security, if rendered available, is certainly quite sufficient to cover the balance. A proposition has lately been made, on behalf of the Bank and the sureties, to settle the whole balance due to the United States, by the payment of $107,632 58 in cash, by instalments, all falling due in eighteen months, and well secured, and the residue by a levy on real estate in Boston, to be set off by appraisement under the execution laws of that District. The acceptance of this offer is recommended both by the District Attorney and Mr. Choate, in general terms; and there would be no hesitation in agreeing with them as to the expediency of so doing, if the whole payment had been proposed in well-secured cash instalments, even somewhat more distant than those now offered; but the large amount of real estate already received towards the satisfaction of this debt makes it, in my opinion, inexpedient to take more, if there is a reasonable prospect of securing the debt in any other way. If, as is alleged, there is but little personal estate of the Bank that can be made available, other than what is now offered, which is, besides, previously pledged for the indemnity of the sureties, the question of expediency must chiefly turn upon the prospect of a recovery from the sureties in the suit brought on their bond for the Bank, and the comparative advantage of relying upon that in preference to the present offer.

Under these circumstances, and before giving any answer to the proposition, I referred it again to the District Attorney and Mr. Choate, for fuller information on these points. Their reply has not yet been received.

In reply to the inquiries of the resolution which relate to the Franklin Bank, I have to say, that, on the 14th of August, 1837, a Treasury transcript of the settlement of the account of that institution, showing a balance due to the United States of $17,469 10, together with a copy of the agreement with the Treasury Department, making it a public depository, and a copy of the official bond, were received at this office, and forwarded on the same day to the District Attorney of Massachusetts, by direction of the Secretary of the Treasury, that he might obtain payment of the balance due the United States, or ample and satisfactory security, which it was believed the Bank was ready to furnish. The District Attorney was also directed to give this matter his early and particular attention, and report the result. Promises were made by the officers of the Bank to settle the balance due, and additional security was obtained by the District Attorney, consisting of $4,478 in Bank bills, the proceeds of which, amounting to $4,468 75, have since been paid into the Treasury, and reduce the debt to $13,000 35, exclusive of interest. It being found impossible to obtain further payment, suits were instituted, in January, 1838, against the Bank and the sureties in its official bond. These suits were still pending at the last return of the District Attorney, a continuance having been granted by the court on the application of the defendants. No special report has been received from that officer as to the adequacy of the security in the official bond, or as to the prospect of realizing the balance still due from the assets of the Bank. The amount, however, is so small, that it is presumed there is no danger of its not being recovered from one or other of these sources.

In reply to the inquiries of the resolution which relate to the Lafayette Bank, I have to say, that no account against that institution has been sent to this office for suit, nor is it known to me that anything is due from it to the United States.

Very respectfully, yours,

H. D. GILPIN, *Solicitor of the Treasury.*

To the Hon. LEVI WOODBURY, *Secretary of the Treasury.*

J.

Opinion of Messrs. Mills and Choate, upon the liability of the Bank sureties.

Boston, February —, 1839.

To the Solicitor of the Treasury.

SIR,—We have examined the question as to the liability of the sureties of the Commonwealth Bank, on their bond dated Feb. 14, 1837. This bond has the signatures and private seals of John K. Simpson as President, and Charles Hood as Cashier of the Bank; but as the bond is not sealed with the seal of the Corporation, the acts of the President and Cashier did not bind the Bank. Hall J. How and eight others executed the bond as sureties for the performance of the contract entered into by the Bank on the 15th July, 1836. There are some expressions in the bond of the 14th Feb., which would seem to extend the liabilities of the sureties to "any deposits remaining with the said Bank at any time prior to the 1st day of Nov., 1837." But it is very clear from an

examination of the whole instrument, that the obligation of the sureties is not more extensive than that of the Bank, under the contract of the 15th of July. By that contract the Bank was bound "to discharge all the duties and services prescribed by the act of the 23d of June, 1836." On the 12th day of May, 1837, the Commonwealth Bank "refused to redeem its notes on demand in specie," and on the 18th of the same month the Secretary of the Treasury notified the President of the Bank that that institution was no longer a depository of the public money. For any deposits made subsequent to the 18th of May, the Bank would be liable in an action of assumpsit for money had and received, but not in an action of debt on the contract. And if the Bank is not liable for such deposits in an action *founded on the contract*, the sureties are not. In this view of the case, it is necessary to inquire what was the amount of public money on deposit in the Bank, on the 18th day of May, and how much of that sum remained unpaid at the time the actions were commenced against the sureties. From the books of the Bank, it appears that the amount of deposits, standing to the credit of the Treasurer of the United States, and receiving and disbursing officers, on the 18th May, 1837, was $697,497 90. The balance remaining due of these deposits, at the time the actions were commenced against the sureties, in January, 1838, was $106,640. For this sum the sureties were liable, but for nothing further. The sum of $166,437 90 has been paid on the execution issued against the Bank, and for which the sureties are to have the benefit, if a judgment is recovered against them. In addition to this, the Bank now proposes to pay, or secure to be paid, in cash, $107,000. If we are correct in the view we have taken of the subject, it is manifest that nothing is to be gained by further prosecuting the actions against the sureties.

We are, &c.,

(Signed,) JOHN MILLS, *District Attorney.*
R. CHOATE.

K.

William Wright to Mr. Gilpin.

Boston, July 22, 1839.

SIR,—In your official statement of the compromise made with the Warren Association, you have spoken of Mr. Choate, and have alluded to other persons whose names were not given, as the source of information relied upon in giving the transaction your official sanction. As I have an interest in knowing who those other persons were, I must request of you the information.

Probably, those friends of the administration, most favorably known at Washington, were looked to as the most suitable source of inquiry; such, if you please, as Mr. Parmenter, of Congress, Mr. Bancroft, the Collector, and perhaps Judge Morton.

If those individuals, or either of them, were consulted, and spoke of this transaction in terms of approbation, I should be glad to know it. I should be glad, also, to know whether they referred you for information to other persons, and who such other persons were. In fact, I am desirous of having the names of all who have given favorable accounts of this affair, designating those whose statements were in reply to your solicitations, from those whose statements were merely voluntary.

The favor of this information I think I have a right to ask and to expect—inasmuch as the representations which I had previously made concerning the matter *have been discredited and set down as false*, in consequence of the contradictory accounts received from the persons thus alluded to in your report.

With much respect, your obedient servant,
WILLIAM WRIGHT.

To HON. HENRY D. GILPIN,
Solicitor of the Treasury.

L.

Report of Mr. Solicitor Birchard, to Congress, May, 1840.

Office of the Solicitor of the Treasury, May 25, 1840.

SIR,—I received on the 16th instant the letter of the Hon. William Key Bond, chairman of the Select Committee of the House of Representatives, addressed to you, under date of the 13th instant, and enclosing a copy of the memorial of William Wright, and the following resolution of the Select Committee, to wit:

Resolved, That the chairman be directed to ask the Secretary of the Treasury to furnish the Committee with the following information, viz.:

1. With copies of all contracts made with the Commonwealth Bank at Boston, for the deposit of the public money in the same, and of all bonds and other securities taken by the Department for the safe keeping and repayment of the public money.

2. Copies of all contracts at any time made by the Department, or any of its agents, by which additional security was obtained for the sums due from said Banks, or any portion of them, and of all papers relating to such contracts.

3. Copies of all correspondence of the Department with its agents or others, and of all other papers relative to the compromise by which certain real estate, in South Boston, was taken in satisfaction of a large portion of the claim of the government against said Banks.

4. That the chairman also request the said Secretary to furnish the Committee with copies of any other papers on file in his Department, and with any other information in his possession, showing the terms and character of the aforesaid compromise.

A true copy.

Attest: WILLIAM KEY BOND, *Chairman.*

In compliance with the request of the chairman of the Committee "for any explanation or suggestion which may be thought pertinent to the subject," and for copies of all the papers indicated by the resolution, and in obedience to your requisition, I immediately directed all the clerks in my office, with the exception of Mr. Harpar, to commence preparing the copies called for, and thus employed them continuously until Friday last, before the copying was completed. Too much time was necessarily employed in comparing their work, to enable me to transmit the papers during the succeeding day.

I have now the honor to submit the same, (a list whereof is annexed,) which, so far as my knowledge extends, contain all the information that the records or files of this office can now, or could at any time heretofore, furnish, throwing any light upon the transaction, or in any way capable of aiding the Special Committee in their investigation.

It seems to me that the very full report of my predecessor, dated January 25, 1839, will supersede the necessity of any extended remarks from *me*. It may be pertinent, however, to the subject, to state, that I do not regard the proceeding in the light of a compromise.

Had the United States succeeded in obtaining a judgment against the Warren Association, and put forth its execution and caused a levy to be made upon its real estate, I apprehend that the laws of the State would have forced government to take it at the appraised value; for government would then have stood, in relation to the demand against the Warren Association, in no better condition than the Commonwealth Bank would, and could have enjoyed no greater privileges. If the Association could have compelled the Bank to extend its writ upon real estate, (of which I have no doubt,) they could also have required the United States to pursue the same course, whenever as creditors of the Bank judgment should be rendered in their favor.

Supposing it then to have been necessary to resort to this means of securing the debt, which I think is abundantly shown by the evidence herewith transmitted, and it will follow that the compromise amounts, in substance, to the same thing, precisely, which, under the most favorable result, would have been produced by prosecuting a suit as creditor of the Bank against the Association. If it would have been legal to subject the land in due course of law, at the termination of a long and difficult litigation, to payment of the debt of the United States, I am at a loss to conjecture a reason why it would be unlawful to do the same thing in a more summary and amicable way.

I have not seen evidence of fraud or official misconduct on the part of any of the law officers of the government. My predecessor's letters and the report of Mr. Mills will, however, speak for themselves, in connection with the papers. The latter was fully justified by the report of the Hon. *Rufus Choate*, and, though furnished by me with a copy of the memorial, signified in the enclosed letter his willingness to rely upon his former explanation in answer to similar accusations. In adjusting a claim of this magnitude, it was necessary to incur great responsibility, and had the District Attorney refused to do it, and lost thereby the chance of saving anything from the debt of the Warren Association, he would have been justly censurable, and could not have escaped blame. Whereas, if he could get a fair appraisal, which, with the precaution taken, he had a right to expect, no one would have doubted the propriety of his course under the embarrassing state of the debt and the doubtful contingencies that clouded the prospect of eventual recovery. The Bank was known to be hopelessly insolvent. The bond given as security, certainly covered but a small portion of the debt due to the government; and if, as was strongly presented in the grounds of defence taken by the sureties, and set forth at large in their several special pleas, the bond itself was not such a contract as could be enforced by the laws of Massachusetts against the Bank itself, the sureties were entirely discharged from all liability whatever. These were considerations which third parties might well overlook. I am not surprised that Mr. Wright overlooked them, yet it would have been unpardonable in the District Attorney if he had omitted to take them into consideration. It would have been equally unpardonable had he omitted to anticipate the possibility that, in the event of a recovery against the private Association, which, from the nature of the controversy, he could not expect would be had in a short time, he might find all the personal effects of the members placed beyond the reach of the law, or even the debt itself satisfied by arrangement with the Bank before he could take the means of securing it. It was negotiable paper, and it had, in fact, been already negotiated by being pledged to the *bondsmen*. A reasonable exercise of the usual ingenuity of bankers would have soon placed it beyond the ordinary vigilance of the law, if those interested had felt so disposed.

Viewed fairly, and it seems to me that the whole of the complaint finally resolves itself into this: was the land appraised too high? On this point there are various opinions. Some have said it was not worth one fourth of the sum at which it was appraised, and never will be. Others put it at a half; some at ten, others twelve, others at fifteen cents per foot, the price at which the appraisers set it over to the United States. Some have valued it higher than the appraisal. Since I came into office, I have made inquiries of every one that I have met who knew, or professed to know, anything about its value, and no two have yet been found who agreed. The answers given to my inquiries, the general description of the property which I have, the state of the money market, and the gradual reduction of the prices of land consequent upon the reduction of the circulating

medium, have fixed upon my mind a strong belief that the amount of $160,000 could not now by any means be realized from its sale. Every one with whom I have conversed, has advised against bringing it into market at present. I have been assured that the best real estate in Boston, if put into market in large quantities, would not now command, in cash, the half of what was considered its cash value two years since. The fairness or unfairness of the appraisal may in one sense be set down as a problem, which time alone can solve with any approach to certainty. It may turn out like the real estate made over to the United States by the late Edward Livingston, which, after the lapse of four years only, overpaid the principal and interest of a debt of over $40,000, although in the mean time it was considered as a totally desperate debt; or, like the lands of the late Edmund Randolph, which were considered of no great value when taken by the United States, but which, in a few years after, overpaid the whole debt and interest, amounting to over $53,000 principal. Certainly the location of the property at South Boston is such as to make such a supposition by no means improbable. Be this, however, as it may, be the appraisal too high or too low, I can yet see no way in which the officers of the United States could have taken greater precautions to secure a fair appraisal; and if there has been any fraud in the transaction, it must have been perpetrated, as the District Attorney states in his report, by the deliberate perjury of Messrs. Gurney, Merrill and Binney, the appraisers,—men whose character I have understood to be above suspicion. A difference of opinion about the value of a piece of property, in a city of the size of Boston, is but poor matter of evidence to sustain any such imputation, or, in fact, any imputation touching the integrity of men of fair character.

In conclusion, I feel myself constrained to say, after the most careful examination of the whole correspondence, that the course of proceedings adopted by the law officers of the government, (though attended with great and serious responsibility, from which they did not shrink,) was strictly justifiable in a legal point of view, and that I cannot find in the evidence anything whatever to sustain the charge that their motives were incorrect, or that there has been in any step taken by them any official impropriety, much less the slightest ground for charging them with fraud.

Very respectfully, yours,

(Signed,) M. BIRCHARD, *Solicitor of the Treasury.*

Hon. Levi Woodbury, *Secretary of the Treasury.*

Note referred to on page 15.

The origin and proof of the $42,000 *check.*

Washington, Treasury Department, March 11, 1844

Dear Sir,—By reference to the Treasurer's office, it appears that on the 4th of December, 1837, a draft for $42,000 on the Commonwealth Bank of Boston, with $8,000 in Treasury notes, was sent you from that office, accompanied with the usual printed letter, and receipts for the draft and notes. The receipts signed by you are on file, but a copy of the letter was not preserved, it not being the practice to keep copies of such letters. Your letter of the 9th December, 1837, acknowledging the receipt of the draft and Treasury notes, is on file in this department.

With high regard and respect,

Your obedient servant,

J. C. SPENCER.

Hon. David Henshaw, *Boston.*